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IN THE

Supreme Court of the United States

October Term, 1993

CLINTON EDWARD VINCENT, JR., Administrator of the Estate of Myra Lisa Vincent Knick,

Petitioner,

v.

CITY OF LEXINGTON, a Virginia Municipal Corporation; BRUCE BEARD, City of Lexington Police Chief,

Respondents.

Petition for A Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a policeman's wife, who has repeatedly protested to police superiors her husband's misconduct, including violent misuse of an official issue weapon, fail to state a claim under 42 U.S.C. 1983 when her husband finally uses that weapon to kill her?

II. Are the Chief of Police and Municipality, who have with independent gross misconduct subjected a police officer's spouse to unreasonable danger of assault and death by an official issue weapon, insulated from liability under 42 U.S.C. 1983 when the officer even though on duty and in uniform kills his spouse in a domestic dispute?

LIST OF PARTIES

The only parties to this proceeding are named in the caption: Clinton Edward Vincent, Jr., is the duly qualified administrator of his decedent sister's (Myra Lisa Vincent Knick) estate and brings this action on her behalf and on the behalf of her surviving infant children, Alison (5) and Jared (4). The City of Lexington is a Virginia Municipal corporation and Bruce Beard is the City's police chief

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

RELEVANT STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

A. Lexington Police Department–Breeding Violations of Rules and Regulations 6

B. Officer Jerry Knick–Undisciplined, Violent, Suicidal, Womanizer, and "Quickdraw" Firearms Instructor 8

C. January 9-14, 1990–The Charlotte Trip, The Molly Crowder Tape, the Weapon Surrender and the Fourth Suicide Attempt– A Cumulative Policy Failure 12

Page

D. The Post-Charlotte Counseling of Jerry Knick–No Funds, No Records, No Discipline and No Effect–But Otherwise Fit for Duty and "...an Asset to the Lexington Police Department" 15

E. Lisa's Death–the Shooting of September 291, 1990–a Tragic Ending to a "Garden Variety" Domestic Dispute But with Known and Preventable Causes 17

REASONS FOR GRANTING THE WRIT 23

A. THERE EXISTS A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS ON THE TEST FOR ACTION UNDER COLOR OF STATE LAW 23

B. DOMESTIC VIOLENCE AS A CUSTOM AND PRACTICE OF MUNICIPAL POLICE OFFICERS IS A COGNIZABLE INTEREST UNDER THE U.S. CONSTITUTION AND 42 U.S.C. § 1983 29

CONCLUSION 30

CERTIFICATE OF SERVICE 31

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS U.S.: Page

Fourth Amendment 1,2

Fifth Amendment 1,2

Eighth Amendment 1,2

Fourteenth Amendment 1,2,24

CASES:

Adickes v. S. H. Kress & Co., 398 U.S.144 170, 90 S.Ct. 1598, 1615,26 L.Ed.2d. 142 (1970) 24

Anderson v. Liberty Lobby, 477 U.S. 244 254 106 S. Ct. 2505, 2512-2513, 91 L.Ed.2d. 202 (1986) 23

Berry v. City of Muskogee, 900 F.2d. 1489, 1498-1499 (10th Cir. 1990) 27

Blum v. Yaretsky, 457 U.S. at 1004, 102 S. Ct. at 2786 24

Bonsignore v. City of New York, 683 F.2d 635. 637-638 (2d Cir 1982) 28

City of Canton v. Harris, 489 U.S. 378, 109 S. Ct at 1206 (1989 3,25,29

Collins v. City of Harker Heights, Tex ___U.S.___, 112 S. Ct. 1061, 1069 n.10 (1992) 29

Cortes Quinones v. Jimenez-Nettleship, 842 F.2d.556, 561 (1st Cir. 1988) 27

Cornelius v. Town of Highland, Ala, 888 F.2d.348, 353-358 (11th Cir. 1989), *Cert. denied*___U.S.___, 110 S.Ct. 1784, 108 L. Ed.2d 785 (1990) 26,28

Czajkowski v. City of Chicago, Ill. 810 F.Supp. 1428, 1438-1440 (N.D. Ill, 1992) 29,30

Flagg Bros., Inc.v. Brooks, 436 U.S. 149, 166, 98 S.Ct. 1729, 1738, 56 L.Ed.2d 185 1978 24

Jackson v. Metropolitan Edison Co, supra, 419 U.S.at 357, 95 S.Ct. at 456 24

Knick v. Commonwealth, 412 S.E.2d (Va Ct. of Appeals, 1992) 5

Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492 497-498, 81 S.Ct 463 (1961) 24

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173, 92 S. Ct. 1965, 1971, 32 L.Ed.2d 627 (1972) 24

Morgan v. Dist of Columbia, 824 F.2d 1049, 1058-1059 (D.C. Cir 1987) 27

Nishiyama v. Dixson County, Tenn,814 F.2d. 277, 281 (6 Cir. 1987) 25,26

Reed v. Gardner, 986 F.2d. 1122, 1127 (7th Cir. 1993) 26,28

Rendell-Baker v. Kohn, supra, 457 U.S. at 840, 102 S. Ct. at 2771 24

San Francisco Arts and Athletics v. Olympic Committee, 483 U.S. 522, 546, 97 L.Ed.2d 427, 107 S.Ct. 2971, 2986 (1987) 23,25,28

Screws v. U.S., 325 U.S. 91, 89 L.Ed. 1495 (1945) 3,27,28

Smith v. Commonwealth, ___Va.___, 389 S.E.2d 871, 879 (1990) 5

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) 3,24,25

U.S. v. Tarpley, 945 F.2d.806, 809 (5th Cir. 1991) *cert denied*, ___U.S.___, 118 L. Ed. 562, 112 S.Ct. 1960 (1992) 27

Vosberg v. Solem, 845 F.2d. 763, 766-767 (8th Cir. 1988) 27

Statutes

18 U.S.C. § 241, 242 27

42 U.S.C. § 1983 1-4,24-25,27

28 U.S.C. § 1331, 1343, 1254 1

OPINIONS BELOW

Opinion in Clinton Edward Vincent, Jr. Administrator for the Estate of Myra Lisa Vincent Knick v. City of Lexington, et al., by the United States District Court for the Western District of Virginia, Kiser, J., Civil #91-0048-L, August 28, 1992 (unpublished) .....**App** at 3-13.

Opinion in Clinton Edward Vincent, Jr., Administrator for the Estate of Myra Lisa Vincent Knick v. City of Lexington, et al. by the Fourth Circuit Court of Appeals, per curiam, Record #92-2129, September 1, 1993 (unpublished).....**App.** at 14-19

JURISDICTIONAL STATEMENT

On September 23, 1991, Petitioner filed this action against the City of Lexington and its Police Chief for violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments to the U. S. Constitution and pendent State law claims. This action was filed in the United States District Court for the Western District of Virginia. Jurisdiction was founded upon the provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 1331, 1343. The decision of the District Court rendered on August 28, 1992 was timely appealed to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1291. That Court issued its opinion on September 1, 1993. Jurisdiction of this Court over Petitions of Certiorari is pursuant to the provisions of 28 U.S.C. § 1254 (1).

RELEVANT STATUTES AND REGULATIONS

42 U.S.C. § 1983. The full text of this statute is set forth in the Appendix at Page 20.

STATEMENT OF THE CASE

". . . a garden variety domestic dispute. . . " where an on-duty, in uniform police officer shoots and kills his wife with his service weapon.

On September 23, 1991, Clinton Edward Vincent Jr., the brother and duly qualified Administrator for the Estate of Myra Lisa Vincent Knick, filed suit on behalf of his sister's estate and her surviving infant children, Jared, now four years old and Allison, now five years old. A 42 U.S.C. § 1983 action in the United States District Court for the Western District of Virginia, this suit was brought against the City of Lexington, its police chief, and Officer Jerry Knick for their role in the shooting death of his sister, Lisa Knick, on September 29, 1990. Officer Knick used his 9mm service weapon loaded with hollow-point bullets to shoot and kill his wife, Lisa.

The Complaint alleged violation of Lisa's Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitutional rights plus a pendent state law claim. Officer Knick's conviction on second degree murder charges and the resulting disability therefrom permitted his dismissal as a party defendant in February 1992.

Following extensive pre-trial depositions of Police Chief Bruce M. Beard, Lt. Steven Crowder and Sergeants Miller, Pedersen, Straub, and Sutton; Officers Mark Ramos and Fred Smith; plus Officer Knick's first wife, Debbie Gibson; former Police Officers Betty Jean Bowser, Harold Bruce Nedrow and Gordon Philip Joines; plus two experts--Dr. Harvey Goldstein and Glen R. Murphy, a one-hour Summary Judgment Motions hearing was held upon Defendants' Motion for Summary Judgment on August 14, 1992.

Ruling on August 28, 1992 that Lisa Knick's death was

a result of ". . . a garden variety domestic dispute which had a tragic ending . . . " the District Court, Kiser J., found the 42 U.S.C. § 1983 claims as not having the requisite action under color of state law. The District Court ignored evidence of Knick's assaultive behavior toward his first wife, his suicidal posturing with his service weapon and the consistent cover up of his other misdeeds including his police-funded trip to attend a "sex crime" school in Charlotte, N.C. on January 1990 where his wife (acting upon a phone call from Lt. Crowder's wife) confronted Knick with his paramour and retrieved his service weapon. **Fearful for her safety, her children's safety and Knick's safety because he had threatened suicide when confronted,** Lisa Knick surrendered the weapon to the Lexington Police Department; it was returned to Officer Knick 48 hours later with the only check of his fitness for duty being whether he could play Nintendo with Sgt. Miller.

Acknowledging but repudiating cases calling for a finding of action under color of state law where there had been misuse of state power, the District Court further bypassed without discussion cases from this Court requiring heightened scrutiny for official weapons misuse and training, Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L.Ed.2d. 1 (1985) and City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. at 1206 (1989). Instead, the Court relied heaving on Screws v. U.S., 325 U.S. 91, 89 L.Ed. 1495 (1945) and its dicta that actions by officers within the ambit of their personal pursuits are exempt from liability under 42 U.S.C. § 1983.

A timely appeal was taken and the Fourth Circuit Court of Appeals issued its opinion on September 1, 1993 affirming the District Court and again relying on Screws v. U.S.

The Circuit Court of Appeals opinion was per curiam and unpublished and ignored a substantial record of Knick's misdeeds and the overt encouragement he received from the

City of Lexington and its police chief.

Clinton E. Vincent, Jr. now seeks a writ of certiorari for review of that Court's decision.

STATEMENT OF THE FACTS

Follow the gun, follow the cover-up.....

On September 29, 1990, Lisa Knick was shot and killed in her home by her on-duty police officer husband, Jerry Knick. He was permitted by custom and practice to come home during his shift. He used his police-issued 9mm service weapon with hollow-point bullets.

At the time of the shooting, Officer Knick had been employed by the City of Lexington Police Department (at most 16 members) for eight years. During that period, he amassed an objectively appalling performance record, failing to be promoted to Sergeant in 1987 and accumulating a reputation for violence, suicide threats, gun play and womanizing--all known to members of the Department except Chief Bruce Beard. Chief Beard has been at the Department since 1970. Beard denied knowledge of all but Knick's womanizing.

In retrospect, there was fundamental consistent and sustained misuse of Knick's service weapon. The weapons policies and practices of the City of Lexington and its police chief resulted in Lisa Knick's unnecessary death and the City and the Chief's liability under 42 U.S.C. § 1983.

Even though he was a Lexington Police Department fire arms instructor, Jerry Knick's gun was never where it was supposed to be. He was a "quick-draw" gun play aficionado and used it also to posture suicide (3 or 4 times)--mostly when he would be remorseful after being caught in one of several extra

marital affairs. In January 1990, Knick's gun was in his car at a motel in Charlotte, N.C. where Officer Knick was spending the night with a paramour while on police business paid for by the City of Lexington of attending a sex crime school.

Knick's assault on his first wife in 1984 --uninvestigated and undisciplined--would be the prelude to Lisa's death. The following account of critical events and policies for Officer Knick and the City and the Chief shows substantial encouragement :(1) the lack of written reporting procedures breeding violations of rules and regulations; (2) the resulting lack of discipline for Officer Knick ; (3) culminating in his trip to Charlotte and Lisa's attempt to surrender his service weapon and have him separated from it; (4) the post Charlotte response of the City and the Chief-- a pay raise, sniper school and a commendation; (5) the events on the night of the shooting showing continued favoritism and a coverup; (6) the inconsistent discipline and (7) petitioner's expert testimony mandating Officer Knick's separation from his weapon.

Where is Jerry Knick now? Knick's first conviction of second degree murder was over-turned on the basis of a questionable ruling by the Virginia Court of Appeals that evidence of **Knick putting his service weapon to the head of his first wife** was not probative of his claim of accident. Knick v. Commonwealth, 412 S.E.2d. 479 (Va Ct. of Appeals, 1992); but cf. Smith v. Commonwealth, ___Va.___, 389 S.E.2d. 871, 878-879 (1990). Knick's was retried in January 1993 and did not appeal; he is serving a sentence of 10 years.

References to deposition testimony herein are designated with the exception of the depositions of Chief Beard, Lt. Crowder, and Sgt. Straub to the page reference at the Fourth Circuit Court of Appeals and the Joint Appendix therein.

A. Lexington Police Dept.--Breeding Violation of Rules and Regulations By Non-Reporting of Disciplinary Matters

> " . . . The more you stir shit, the worse it stinks and I just didn't see any sense at that time in making more stink . . . " (Sgt. Straub App. at 138).
>
> " . . . It's kind of like your family because you're with them more than you are your family . . . " (Officer Fred Smith at 427).
>
> " . . . [the Chief] [did] . . . not have to go around Robin Hood's barn a lot of times to find out things . . . " (Sgt. Straub App. at 131).
>
> " . . . I didn't have enough evidence to discipline him . . . " (Chief Bruce M. Beard App. at 57)

The City of Lexington is a town of slightly less than fifteen thousand residents situated in the Blue Ridge mountains in the western part of Virginia.

The size of the Police Department (16 members or less from time to time) and the size of the town made it highly likely that every police force member and many citizens could and did have practical knowledge of any officer's activities. One Lieutenant (Crowder), three Sergeants (Straub, Sutton and Pedersen), three officers (Burgdorf, Smith and Ramos) and a former officer (Joines) **testified that Knick's activities were common knowledge.** [Sgt. Straub App. at 131, 142-- " . . . it's a small town . . . and everyone has a scanner . . . . . " ; Sgt. Sutton at 511 ; Joines at 288 ; Sgt. Pedersen at 380 ; Smith at 424, 427 ; Ramos at 400, 403 ; Burgdorf at 198, 207 ; Lt. Steven Crowder App. at 79, 82, 100]

This common knowledge factor was coupled with a **consistent policy of failing to require written reports of significant incidents.** Nowhere in Knick's employment records (App. at 23-34) is there any mention of any of his suicide threats, his womanizing or his gunplay. The service weapon surrender by Lisa Knick is nowhere in his employment records, nor is his improper use of City funds.

With regard to the weapon surrender, Sgt. Straub made a decision not to fill out the required reporting forms,(so-called "blue sheets") . (Sgt. Straub App. at 119, 143). Sgt. Straub's immediate superior neither required Straub to write a report nor did he make a written report himself (Lt. Crowder App. at 91). Chief Beard in turn did not request a written report from Lt. Crowder or Sgt. Straub regarding what Lisa Knick related to Sgt. Straub at the time of her surrender of Knick's service weapon. Chief Beard admitted that this was a violation of departmental rules and regulations. (Chief Beard App. at 44, 45). Chief Beard claimed no one told him about these activities (App. at 57) and admitted he would discipline an officer for failing to report a violation of departmental rules and regulations even though he had not done so (App. at 62).

Thus, discipline at the Department was non-existent for Knick as a result of a pattern and policy of non-reporting, non-investigation, and non-action. (Lt. Crowder App. at 79, 84; Nedrow at 364; Sgt. Pedersen at 391; Joines at 290, 292, 295 and 298).

At every step of the way the City and the chief chose to ignore Knick's transgressions by abandoning reporting of

offense or incident conduct.[1]

B. Officer Jerry Knick–Undisciplined, Violent, Suicidal, Womanizer, and "Quickdraw" Firearms Instructor.

In November of 1984, Deborah Gibson, then Deborah Knick, called for police assistance because Jerry Knick (from whom she was separated) had hit her after she had words with him. Lt. Steven Crowder took an Offense Report and filed it but the then Mrs. Knick (nee Gibson) dropped the charge due to Knick telling her he would lose his job and there would be no more child support (Gibson at 260). Had the police department chosen, as they were required to do, to investigate as a result of this incident, they would have found a pattern that would be tragically repeated six years later.[2] **Knick's** modus operandi **was to take out his weapon and hold it to his wife's head, threaten to kill her and then himself** (Gibson at 261). Knick hit her as well possibly causing a miscarriage and he also had threatened her with a butcher knife (Gibson at 258, 263). He would become dangerous when his extra marital affairs were discovered (Gibson at 264, 265). He had a girlfriend in Lexington but was jealous of his wife going out with friends and often threatened her. (Gibson at pages 257, 258). This pattern

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[1] Petitioner's Police Practices Expert, Glen R. Murphy, indicated that the City lacked any adequate investigative or reporting procedures and that this in turn caused a failure to supervise or discipline on two basic levels; and further, that the reporting system was required even to investigate rumors. (Murphy deposition at 532-533, 541, 542, 563).

[2] Petitioner's Police Practices Expert, Glen R. Murphy, testified that the failure of the City of Lexington Police Department to investigate this particular assault facilitated a pattern of violence (Murphy deposition at 534, 535, 540).

was continued by Knick in later years--womanizing, being discovered, threatening suicide and expressing remorse (Gibson at 262, 265, 266).

The official Police Department response was not to investigate this incident and to simply tell Gibson (Knick's first wife) what steps she could take to prosecute the matter (Lt. Crowder App. at 71, 72; Chief Beard App. at 60). This incident was known to members of the Department (Sgt. Pedersen at 21; Nedrow at 364, 365; Sgt. Sutton at 497).

The pattern of Knick's behavior that resulted in Lisa Knick's death in 1990 was evident in 1984 and the Department chose not to investigate.

Stun-gun Use on Unarmed Civilian. On 23 September, 1985 Jerry Knick received oral counseling for his attitude and misuse of a stun gun-- on a defenseless suspect. This counseling was reduced to a memorandum. Knick was not disciplined other than being told to change his attitude. Reminded that he had placed more assault and battery/resisting charges against citizens than any other officer. . " (App. at 28) Knick suffered no reduction in pay, nor suspension, and was given a merit increase for the period in question (Evaluation of August 14, 1986).

Deposition testimony revealed that photographs of the victim of the stun-gun incident were taken. These photographs were either lost or destroyed, though both Lt. Crowder and Sgt. Straub saw the pictures (Lt. Crowder App. at 90-91; Sgt. Straub App. at 136). Chief Beard, however, denied ever seeing any pictures even though he reviewed Knick's entire file when he

became Chief in 1987 (Chief Beard App. at 50, 39).[3]

With the public, Knick had a history of excessive force; and, from his colleagues he received mixed reviews regarding his self-control.[4] Yet, Chief Beard did nothing.

Womanizing and Suicide Threats. Jerry Knick had many extra-marital affairs during his tenure at the Lexington Police Department. He would threaten suicide when he was discovered or when he otherwise wanted to get his way. These threats were life-threatening to Lisa Knick because of Jerry's ready access to firearms and because of his frequent habit of drawing his loaded weapon. He was also a danger to any third party since suicide attempters frequently take hostages even in the midst of an intervention.[See Testimony of Glen R. Murphy, Petitioner's Police Practices expert and former director of the

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[3] Petitioner notes that Chief Beard would have and did minimize the importance of this information when promotions to sergeant were being considered. Neither the memorandum nor the pictures of the stun gun victim (if he could have found them) were submitted to the individual whom the City of Lexington used to screen possible problem behavior in the promotion process (Chief Beard App. at 51). Petitioner's Police Practices Expert, Glen R. Murphy, testified that this was another example of failure to investigate adequately and discipline appropriately especially where photographs were at hand (Murphy at 532-533, 534, 543).

[4]See Nedrow at 360,361,362; Smith at 428; Sgt. Straub [supervisor for 1984-1986] App. at 139, 140, 125; Sgt. Pedersen [supervisor for March '84 to March '85] 388,389,390; Sgt. Sutton [supervisor at time of shooting] 499,500, 501; B.J. Bowser at 161, 174, 188; Sgt. Miller at 339, 355, 356, 350; Lt. Crowder App. at 81, 93.

International Association of Chiefs of Police at 547-549, 534, 539, 580; Murphy also testified that if the firearms policy had been followed Knick would not have killed his wife:Murphy at 545].

There were at least four suicide threats when Knick was with Lisa-- and more with Knick's first wife. With Lisa, two occurred in 1986 prior to their marriage; two more occurred in January, 1990.

The response of the Department was to fail to investigate and to minimize the knowledge it had. This reenforced Knick's proclivity for instability, violence and gun-play that caused Lisa's death.

The suicide threats and womanizing would be dismissed by the entire Department as not life-threatening, and within accepted patterns of behavior. 1) no supervision or discipline for womanizing-- [(Sgt. Straub App. at 124, 125, 130, 132, 137, 145 (Sgt. Sutton at 507, 508, 512, 513); (Officer Burgdorf at 196, 197, 201, 203); (Lt. Crowder App. at 79-89] 2) threatening suicide and dismissal of same--[(Sgt. Straub App. at 124, 132) (Bowser at 163,164, 171, 172 177, 186); (Sgt. Pedersen at 382, 385); (Joines at 278, 282, 285, 291, 296, 297, 303, 308, 311, 314);Sgt. Miller at 319,320, 326; Sgt. Sutton at 487, 488, 489, 514; Nedrow at 367, 368, 373, 374; Burgdorf at 199].

"Quickdraw" Knick--the Firearms Instructor. Chief Beard denied ever witnessing or hearing about Knick's gun-play consisting of "quickdraws" of a loaded gun from his holster. Yet it was a prevalent practice in the Department and a frequent practice of Knick's. Officer Burgdorf testified Knick would "quickdraw" his loaded weapon in the office (Burgdorf at 200) Knowledge of this practice was department-wide yet Knick was never disciplined for it (Smith at 419, 424, 434); Straub.

App. at 119; Joines at 299; Bowser at 75, 176; Nedrow at 366, 372; Pedersen at 384.

Knick was a Departmental Firearms Instructor. Knick's actual work as a firearms instructor was based solely on range proficiency; he did not read the firearms policy to his students (Burgdorf at 209) Sgt. Pedersen, (who did read the policy to his fellow officer students) as Knick's instructor, never evaluated Knick (Sgt. Pedersen at 392-393).

The failure to investigate or report this policy violation allowed Knick to commit the ultimate policy violation-- drawing and aiming his weapon where deadly force was not justified resulting in Lisa's death.[5]

C. January 9-14, 1990–The Charlotte Trip, the Molly Crowder Tape, the Weapon surrender and the Fourth Suicide Attempt–a Cumulative Policy Failure

On January 9, 1990, Jerry Knick went to Charlotte, N.C. to attend (on City funds) a Sex Crime school. In Charlotte, he would cohabit with Debbie Potter and be confronted by his wife Lisa, in the early morning hours of January 10 or 11. Lisa went to Charlotte as the result of an anonymous phone call informing her that her husband Jerry was with Debbie Potter in Charlotte in a motel. Lisa made a tape of this phone call and played it for various members of the department who identified

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[5] The firearms policy according to Petitioner's Police Practices Expert, Glen R. Murphy, was hardly a policy at all since it was never enforced. According to Murphy, if it had been followed, Knick would not have killed his wife. Retraining plus discipline was required (Murphy at 545-546, 567-569).

the voice as that of Molly Crowder, Knick's superior's wife.

Jerry had taken Lisa's car to Charlotte. Lisa took his car and drove to Charlotte, N. C. When she arrived, she confronted Jerry and he became upset and suicidal. Lisa switched cars--taking her car with his weapon therein. Fearing what Jerry might do she returned to Lexington took the children and herself away from the marital abode. Lisa then contacted B. J. Bowser to ask her advice about the weapon she found in her car. Bowser advised her to put the weapon in a shoe box; to take it to the dispatcher--but not the desk Sergeant at the Police Station[6]

Lisa turned in the weapon to Sgt. Straub at the Police Station on Friday night, January 12, 1990; she was accompanied by former officer Joines. The matter was treated without any official written report. According to Joines. Officer Smith was there and stated to Sgt. Straub, the duty Sgt., that Straub had better"...cover his ass...". (Joines at 276, 278, 279, 280, 311, 312, 282, 285, 288, 310, 281).

Sgt. Straub conferred with Lisa, heard the Molly Crowder tape, told Officers Smith and Ramos about a possible confrontation with Knick and locked the weapon up (keeping it in a shoe box), again without a written report of its surrender.(Sgt. Straub App. at 114-118, 119; Officer Smith at 420, 422, 421, 423, 430, 431; Officer Ramos at 398, 403, 401. 408). Lisa did not return to the marital abode that night.

Sgt. Straub had to bypass Knick's immediate supervisor

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[6] Accounts of this sequence through the weapon surrender can be found as follows (Joines at 275, 276, 277, 285, 286, 288, 310; Bowser at 178, 179, 183, 184, 185, 182; Sgt. Miller at 329-334 as to location of weapon and car switch.

(Sgt.Sutton) as he was on vacation. Sgt. Straub went to Lt. Crowder's house that evening and conferred with him.

Because **no one filed written reports**, post event accounts show no clear responsibility for the decision to return the weapon to Knick.

Nintendo and the Weapon Return. Sgt. Straub and Lt. Crowder would each claim the other was responsible for giving the weapon back to Knick. Lt Crowder would claim that Sgt. Straub laughed at Officer Knick getting caught. Both would admit no written report was filed. Sgt. Miller gave the weapon back to Officer Knick at Knick's house the following Sunday night when Lisa had left; he checked Knick's fitness for duty by seeing if he could play Nintendo. Miller admitted that he had no qualifications to make a fitness determination; it was his belief that it was Lt. Crowder's decision to give the weapon back. (See Sgt. Straub App. at 120, 121, 127, 142; Lt. Crowder App. at 77, 78, 81, 102, 103, 110).
(Sgt. Miller at 323, 325, 324, 352, 353, 354, 322, 321, 323, 358).

Fourth suicide Threat. As soon as Officer Knick got the weapon back he made a fourth suicide threat. Sgt. Straub, who had previously failed to make a written report of Knick's weapon being surrendered, was at the police station catching up on "...paperwork.." when Lisa called and told him to get out to the house since Jerry (Officer Knick) was throwing a fit. Again, Sgt. Straub did not do any written report of this incident-- even though he found Knick in a fetal position; Officer Ramos, who responded with Sgt. Straub, said that Sgt. Straub told him that he would do a "blue sheet" report; he never did and Ramos never checked (Sgt. Straub App. at 120,, 121, 122, 128, 142-143; Ramos at 411, 29, 397, 399, 24, 400, 402, 404, 406, 415, 413, 405).

Gun again used in threat. Officer Smith testified that

both Ramos and Sgt. Straub told him that Knick had his gun and was threatening himself with it; Officer Burgdorf heard that Knick had his gun and Sgt. Pedersen knew that Knick had handed one of the officers his gun. [Smith at 420; Burgdorf at 207; Sgt. Pedersen at 378].

Chief claims no knowledge of weapon surrender by Lisa Knick; Lieutenant disagrees. No Written Report. Lt. Crowder claimed (in a written report prepared on April 1, 1991 for insurance purposes) that he had spoken to the Chief on Monday, January 15, 1990 (3 days after the surrender by Lisa Knick) and that he did in fact tell his chief that Knick's weapon had been surrendered. Chief Beard claims that Crowder never told him . (Chief Beard App. at 42-44; Lt. Crowder App. Exhibit #2 , App. at 147-150; Lt. Crowder App. at 80, 78-79).

Chief Beard admitted that it was a violation of department policy for Lt. Crowder to have failed to provide a written report of any of this but he further admitted he did not discipline Crowder for failing to do so. (Chief Beard App. at 42-44). Beard further admitted that Sgt. Miller was in no way qualified to do a fitness for duty evaluation for Knick to receive his weapon (Chief Beard App. at 53). Sgt. Sutton, Knick's immediate supervisor, put none of his concerns about Knick in writing and thereby extinguished the possibility of any accountability within the department for remediation and intervention.

D. The Post-Charlotte Counseling of Jerry Knick--No Funds No Records, No Discipline and No Effect--But Otherwise Fit for Duty and " . . . an Asset to the Lexington Police Department . . . "

> " . . . the only time I heard him talk about counseling he made a joke out of it . . . " (Officer Mark Ramos deposition at 414).

" . . . Jerry was kind of joking he had got caught. . . [with his hands in the cookie jar] . . . " (Sgt. Miller deposition at 353).

" . . . Yes, . . . I went in and went back to work and they haven't done anything to me . . . " (Gordon P. Joines deposition quoting Jerry Knick at 289)

" . . . came back to work like nothing happened . . . " (Charles T. Burgdorf deposition describing Knick's return to work after Charlotte at 208).

Chief Beard met with Jerry Knick after Knick's return from Charlotte and took no disciplinary action against him, asking only if he had completed his sex crime school training (Chief Beard App. at 45). The only action taken against Knick was to direct him to get counseling at his own expense. Chief Beard failed to require any written follow-up reports; nor did Chief Beard communicate in writing to Knick's supervisor the fact of Knick being referred to counseling (Chief Beard App. at 44, 45, 46-47, 67). Chief Beard never met with Knick to review his progress or lack thereof (Chief Beard App. at 46-47). Chief Beard sent him to sniper school (Chief Beard App. at 64). In fact Knick was up to his usual behavior and on to his next woman --a nurse at Stonewall Jackson Hospital. Suspicion of Knick's behavior existed with Sgt. Sutton. Sgt. Sutton did question Knick about it and took Knick's denials at face value (Sgt. Sutton at 508, 512, 513). Other members of the Department knew of Knick's womanizing. (Sgt. Miller at 342; Burgdorf at 201; Smith at 426, 432; Lt. Crowder App. at 88).

Jerry Knick received the reverse of discipline--he got a merit increase on his evaluation on June 20, 1990 (App. at 35). This evaluation stated in conclusion, " . . . Officer Knick has done a real good job at the police work which he has

encountered during this evaluation period. He is an asset to the Lexington Police Department" . . . With the Chief's inaction, Knick had a safe harbor for his misbehavior. Again, he suffered no opprobrium as a result of his activities in Charlotte.

E. Lisa's Death–the Shooting of September 29, 1990- A Tragic Ending to a " Garden Variety" Domestic Dispute But With Known and Preventable Causes

> " . . . but when you start to get everybody in the room together, you come to the conclusion that, my God, you all knew this guy was having difficulties and you didn't do anything about it; how come? . . . " (Dr. Harvey Goldstein at 651 [describing intervention process that was required])

> " . . . Q: Why did they turn that weapon back over to Officer Knick?

> " . . . A: Because they were doing a giant coverup of the whole problem. What's the coverup? There was no investigative report written . . .
>
> *** *** ***
>
> " . . . as a matter of fact, they went mouth to mouth insuring nothing was written up on it . . . " (Glen R. Murphy at 550).

The Events of September 29, 1990–No Intervention and A Cover-Up

Lisa Knick's death by shooting of September 29, 1990 did not simply "come out of the blue". The prior inadequate training and inaction of Knick's supervisors, including Sgt. Miller and other officers set the stage for the night of the

shooting. Further, the City's actions through the Department, and Lt. Crowder in particular, may have altered or destroyed evidence against Knick.

On the night of the shooting, Lisa was upset, bags packed and ready to leave. She contacted Sgt. Miller to discuss her problems with Knick. Knick on duty interrupted them but told them to keep talking. Knick left and then returned. Sgt Miller inquired if Lisa was O.K. and left. Minutes later Sgt. Miller heard the shot. Sgt Miller had the authority to separate Knick from his weapon but due to the City and the Chief's inadequate training and supervision did not. Lisa died as a result. (Sgt. Straub App. at 118, 119, 132; Lt. Crowder App. at 77, 81; Sgt Miller at 329-334, 352,357, 358; Chief Beard App. at 53).

Right after the shooting Knick received preferential treatment to minimize the official and intentional character of the shooting. Knick called the dispatcher, sounding distraught, to say he shot his wife. Sgt. Sutton and Lt. Crowder first responded. Sgt. Straub also responded along with Officers Smith and Burgdorf. Sgt. Sutton noticed suitcases to the left side of the door as he walked in (Sgt. Sutton at 502, 517; Officer Smith at 421; Sgt. Straub App. at 128, 130). Knick's weapon went out of sight--first from Knick to Sgt. Sutton, then to Burgdorf and then into Burgdorf's cruiser. Even though Knick was trying to make the shooting look accidental, Lt. Crowder's April 1, 1991 memorandum of Crowder's actions that night reveal a different and more typical pattern for Knick--that Knick stated he struck Lisa several times and then shot her (Lt. Crowder App. Exhibit No. 2, App. at 148). Notwithstanding this evidence of pre-meditation, Lt. Crowder, with the Chief's approval, directed Knick to change his uniform, did not place him in custody and escorted Knick to the hospital. (Lt. Crowder App. at 149). Lt. Crowder at the hospital allegedly made a statement to former Officer Joines (which Crowder denied), "

. . . haven't you ever been mad enough to pull your gun on your wife? . . . " (Joines at 306; Lt. Crowder App. at 104). The plain effect of all of this action was to put the "domestic dispute" spin on any inquiry by the public at the hospital-- the service weapon was not in sight, Jerry was out of uniform--how could it be anything but a domestic dispute?

City and Chief's Policy Response --No Requirement of Written Reports on Fellow Officer Stress

The City's policy response was to hold a debriefing on October 2, 1990, to conduct a mental health briefing on officer stress and finally make mental-health counseling available (October 17, 1990) and to allow Knick to resign rather than terminate him. The policy directive contained no requirement of written reports by fellow officers on observed stress in their colleagues.

Unrelenting Reenforcement--Sending the Message of Approval Through Favoritism and No Discipline

By all accounts, Jerry Knick's dangerous conduct throughout his career was never disciplined but Chief Beard claimed no favoritism for Knick (Chief Beard App. at 65).

Yet, other officers were put through extensive proceedings for violations of departmental regulations. For example, Lt. Crowder went through three polygraphs for alleged drug use. B.J. Bowser, in December, 1989, received unpaid leave for calling in to say that she was stuck in a snowstorm and could not make it back to Lexington. Sgt. Miller received a disciplinary reprimand from Lt. Crowder for leaving his weapon in the police ready room. Fred Smith almost got fired for fighting with a civilian outside of Lexington Police Department jurisdiction. (Lt. Crowder App. at 96, 97; Joines at 274;

Ramos at 407; Smith at 433; Sgt. Straub App. at 467; B. J. Bowser at 187, 189, 191, 192, 193, 194; Sgt. Miller at 344, 346, 347; Sgt. Sutton at 505, 506; Lt. Crowder App. at 81, 82, Smith at 429, Chief Beard App. at 57, 64; Lt. Crowder App. at 101, Sgt. Miller at 345).

Other practices fostered no review or discipline of Jerry Knick. Disciplinary materials, with the exception of "blue sheets", were periodically destroyed. And, when officers failed to fill out the "blue sheet" incident reports they were essentially destroying records of official departmental action. (Sgt. Straub App. at 134; Sgt. Miller at 338; Sgt. Sutton at 498-499).

The failure to discipline Jerry Knick and destroying records that would have been the basis for discipline sent a message to Knick that he could act with impunity. With the City's sustained encouragement, he shot his wife dead. [7]

Expert Testimony--Preventing Lisa's Death by Separating Officer Jerry Knick from his Weapon

Petitioner's experts--Glen R. Murphy, a former police

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[7] The policy promulgation and control at the Lexington Police Department rests effectively with the Chief. His decisions, while technically controlled by the City Manager, are rarely questioned and as such he enjoys practical control of the Department on a day-to-day basis (Chief Beard App. at 59). Lt. Crowder even claims that he did not have to get the approval of the City Manager (Lt. Crowder App. at 106). The Chief's claim that he could not control counseling for Knick because the City did not provide funds must be balanced against the policy change of October 17, 1990 when money could suddenly be found for counseling after Lisa was shot and killed (Chief Beard App. at 67).

executive and supervisor and former director of the International Association of Chiefs of Police, and Dr. Harvey Goldstein, a police psychologist who has seen police officers since 1980 in clinical treatment--were adamant about the City and the Chief's failures.

Both experts testified if intervention had occurred, the shooting and death of Lisa Knick and this lawsuit that followed would not in all likelihood have occurred.

Murphy linked the department's failure to act at critical points in Knick's career with a corresponding heightened risk to members of the public. Murphy observed that suicidal ideation in police officers is particularly hazardous since the police have ready access to weapons suicide attempters often take hostages. (Murphy at 534, 539, 541, 542, 544, 546, 575, 548, 580). The problem was that the City failed to discipline him at every step of the way, and in its handling of the murder investigation showed continued favoritism (Murphy at 544, 559, 565, 566, 568, 580--gunplay; 534, 542, 560, 592--stun gun; 535, 565, 593, 576, 594, 595--womanizing linked to violence at home; 537, 552--murder investigation). **The policy failures were threefold--no written reporting system, no way to check any officer or his supervisor and no guidance to supervisors.** (Murphy at 531, 532, 533, 536, 538, 541, 550, 554, 555, 571--no reporting system; 563-564--no supervision; 570, 575--no way for supervisors to know job). The solution was to suspend Knick, separate him from his weapon and investigate him. (Murphy at 550-551, 559, 575, 576, 596, 575, 577, 580-581. The failure to implement that solution was correlated with Lisa's death and lead to a climate in which her death could and did occur. (Murphy at 574, 591).

Dr. Goldstein amplified Mr. Murphy's requirements for a written reporting system and a separation of Knick from his weapon and evaluation. Dr. Goldstein concurred with Mr. Murphy's negative assessment of the City and the Chief in

failing to discipline Knick and the message of encouragement it sent Knick (and others), (Dr. Goldstein at 607, 609, 631, 627, 644, 651, 642, 614, 616,--no written reporting system-lax procedures; at 606, 609, 615, 616, 632, 634, 642, 652, 653--assault on first wife; 599, 600, 601, 605, 610, 621, 622, 640, 654--suicide threats; 603, 617, 618, 92, 640, 648, 652--weapon surrender; 618, 601, 639, 641, 646, 647--fitness for duty review required.) any suicide threat by a police officer serious since officers have ready access to weapons. (Dr. Goldstein at 600, 604, 617, 599, 601, 605, 640, 649). The stun gun incident showed a blatant, hostile and aggressive act which could expose the City to future liability. (Dr. Goldstein at 608, 612, 613, 633, 634). small department, "rumor mill" and approval of violations(Dr. Goldstein at 627, 644, 651, 643, 614, 616, 635-636). Dr. Goldstein concluded that **an intervention and weapon separation with a clean bill of mental health would have made Lisa's death highly unlikely.** (Dr. Goldstein at 622, 623, 645, 624, 628, 629). This intervention would have resulted in an extended probationary period extending well beyond September, 1990; however, City actually emboldened and encouraged Knick (Dr. Goldstein at 648, 621, 642). **All that was needed was to implement a general order that would require written reports and discipline for failure to report** (Dr. Goldstein at 636, 631, 600).

Instead of taking the available courses of action that would have saved Lisa's life, the City and the Chief covered up Knick's problems, gave him a pay raise, a commendation and sent him to sniper school. The tragic ending of this alleged garden variety domestic dispute belongs to the City and the Chief.

REASONS FOR GRANTING THE WRIT

A. There Exists a Split Among the Circuit Courts of Appeals on The Test for Action Under Color of State Law

If Lisa Knick had died in the 11th, 7th, 6th, 10th, 8th, lst, 5th or D.C. Circuits, her brother, Clint Vincent, Jr., would be able to proceed to court. If she had died in the 2d Circuit, her brother's lawsuit, on behalf of her estate and her two surviving infant children would probably be out of court. This Court needs to set one test for this country for this kind of lawsuit with these kinds of facts.[8]

There is no immediate bright line test for "the ambit of personal pursuits. Instead, this Court has ruled that there is a measurement of the amount of encouragement provided to private actors to determine whether a so-called private actor can be deemed to be a state actor. In *San Francisco Arts and Athletics v. Olympic Committee*, 483 U.S. 522, 546, 97 L.Ed.2d 427, 107 S.Ct. 2971, 2986 (1987) this Court held:

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[8] *Anderson v. Liberty Lobby*, 477 U.S. 244, 254 106 S. Ct. 2505, 2513, 91 L.Ed.2d. 202 (1986) holds " . . . the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor . . . " The Court of Appeals paid no attention to Anderson nor did it follow Anderson's additional directive " . . . the Judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the Plaintiff on the evidence presented . . . " Anderson, supra, 106 S. Ct. at 2512.

Most fundamentally, this Court has held that a government:

> "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant **encouragement**, either overt or covert, that the choice must in law be deemed to be that of the [government] . . . " *Blum v. Yaretsky supra*, 457 U.S. at 1004, 102 S. Ct. at 2786; *Rendell-Baker v. Kohn, supra*, 457 U.S. at 840, 102 S. Ct. at 2771. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166, 98 S. Ct. 1729 1738, 56 L.Ed.2d 185 (1978); *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 357, 95 S. Ct. at 456; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173, 92 S. Ct. 1965, 1971 32 L.Ed.2d 627 (1972); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170, 90 S. Ct. 1598, 1615 26 L.Ed.2d 142 (1970).

This test is consistent with long-standing principles of determination of action under color of state law as expressed in *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492, 497-498, 81 S.Ct. 463 (1961) where this Court held that even though state officers had violated a provision of state law, they could still be liable under 42 U.S. C. § 1983 and the Fourteenth Amendment when they represent the state in some capacity and whether " . . . they act in accordance of their authority or misuse it . . . "

The misuse of a government issued firearm by a on-duty police officer in uniform is the quintessential exercise of state police power.

This Court has had no problem in deciding that weapon based violations of constitutional rights are cognizable interests under the Constitution and 42 U.S.C. § 1983. *Tennessee v.*

Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) and *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 1205, Note 10, ___L.Ed.2d.___ (1989). Both *Garner* and *City of Canton* require effective firearms training.

The "significant **encouragement**, either overt or covert" test set forth in *San Francisco Arts & Athletics v. Olympic Committee, supra*, resonates and is paralleled in other cases in the 6th, 11th, 7th, 10th, 8th, 1st and D.C. Circuits and would subject Officer Knick and others to prosecution under 18 U.S.C. 241, 242 in the Fifth Circuit.

The leading case is *Nishiyama v. Dixson County, Tenn*, 814 F.2d.277 (6 Cir. 1987). Reversing a district court dismissal of a 1983 action where Kathy Nishiyama was murdered by a prison trustee and her parents sued the county. The 6th Circuit held the defendants liable under § 1983 finding a close relationship between the criminal acts and the acts of the defendants under color of state law.

> " . . . in final contrast, the death of Kathy Nishiyama cannot be viewed as so remote a consequence of the defendants' actions as to automatically preclude liability under § 1983. Through their established practice of trusting the police guard Hartman [jail trustee who murdered Kathy Nishiyama], Wall and Fiser set in motion the specific motions that allowed him to commit his crime. They apparently saw no need to respond to the dispatcher's report alerting them to the possibility that Hartman was using the Dixon County patrol car to stop vehicles traveling the roads of Montgomery County. These subsequent failure to act extended Hartman's opportunity. Neither on that night nor on any other occasion did they do anything to stop or disavow Hartman's use of the patrol car for his private purposes. Because of this practice by the

> sheriff's department, Hartman was able to use the apparent authority of the patrol car to direct Kathy Nishiyama to stop several blocks from her home and thus become his victim." 814 F.2d. at 281.

In the years following *Nishiyama's en banc* decision, other Circuits have not been hesitant to follow and when they have, their comparable results have not resulted in this Court's review.

Cornelius v. Town of Highland, Ala., 888 F.2d. 348, 353-358 (11th Circuit 1989), *Cert. denied* ___ U.S. ___, 110 S. Ct. 1784, 108 L.Ed.2d 785 (1990) held that the municipality could be liable for damages suffered by a town clerk who was abducted from a town hall and terrorized by prison inmates who were assigned to a community work squad. The 11th Circuit reversed and remanded the District Court's grant of summary judgment to the Defendants finding that there were genuine issues of material fact as to whether a special relationship existed between the town clerk and the Defendants and whether Defendants were aware that the clerk faced special danger from work squad inmates otherwise known to be dangerous. The 11th Circuit specifically found: (1) Town officials accepted violent prisoners into the community knowing of their dangerous propensities, and (2) other members of the community confirmed that inmates were authorized to have unsupervised access to weapons. By analogy, in this case the City of Lexington and its Chief of Police set in motion forces which unleased a dangerous actor on the community at large and specifically with regard to someone who was exposed to special danger--Lisa Knick. Her surrender of the weapon and the subsequent coverup speaks volumes and would be enough in the 11th Circuit to preclude defendants' summary judgment.

Reed v. Gardner, 986 F.2d. 1122, 1127 (7th Cir. 1993) upheld the sufficiency of a complaint against police officers for

their failure to arrest a drunk driver and the resulting collision. The 7th Circuit there noted that officers

> " . . . may be subject to suit under § 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger . . . " 986 F.2d. 1122.

Similarly, in *Berry v. City of Muskogee*, 900 F.2d. 1489, 1498-1499 (10th Cir. 1990) the 10th Circuit Court of Appeals held that a city could be found deliberately indifferent to the safety of a prisoner who was murdered by fellow prisoners at the Muskogee city-federal jail. The 10th Circuit there held that to satisfied a deliberate indifference standard that the prisoner's estate must show that the City had actual knowledge of the specific risk of harm or that the risk was so substantial or pervasive that knowledge can be inferred; and further, that the City failed to take reasonable measures to avert the harm; and finally, that the City's failure to take such measures in light of its knowledge, actual or inferred, justifies liability for the attendant consequences of its conduct. The 8th, 1st and D.C. Circuits have also upheld a pervasive risk of harm test where knowledge can be inferred for imposing liability under 42 U.S.C. § 1983. *Vosburg v. Solem*, 845 F.2d 763, 766-767 (8th Cir. 1988); *Cortes Quinones v. Jimenez-Nettleship*, 842 F.2d. 556, 561 (1st Cir. 1988); *Morgan v. Dist. of Columbia*, 824 F.2d 1049, 1058-1059 (D.C. Cir. 1987).

The Fifth Circuit following *Screws* (correctly) in *U.S. v. Tarpley*, 945 F. 2d. 806, 809 (5th Cir. 1991) *cert. denied* ___U.S.___, 118 L. Ed. 2d. 562, 112 S. Ct. 1960 (1992) upheld the 18 U.S.C. 241, 242 prosecution of a sheriff's deputy for the assault on his wife's former lover where the deputy lured him to the home, beat him and used his police status with another officer to run the paramour out of town. Tarpley claimed he

was acting simply as a jealous husband but the Fifth Circuit held that "...the presence of police and the air of official authority pervaded the entire incident..."

A contrary result has been reached by the 2d Circuit. *Bonsignore v. City of New York*, 683 F.2d. 635, 637-638 (2d Cir. 1982) [holding impaired officer who shot and wounded wife and committed suicide using his off-duty revolver was not acting under color of state law; upheld diversity based state law negligence claim where evidence showed that the City was negligent in failing to identity officers who were unfit to carry guns and that foreseeable injury could result from an unfit officer carrying a gun].

The emerging test among the circuits is clearly stated in *Cornelius* and *Reed*, *supra*. That test--of a pervasive risk of harm based inquiry--is similar to the "significant encouragement either overt or covert" found in *San Francisco Arts and Athletics, supra*. Consequently, any reliance on *Screws v. United States*, 325 U.S. 91 (1945) as the sole basis for determining whether there is action under color of state law is misplaced. In fact, *Screws* dealt with a mixed personal and official situation. The sheriff in *Screws* was using a warrant of arrest for theft pretextually against a black citizen for whom the sheriff had a grudge; while handcuffed, the citizen was beaten to death. There was "action under color of state law " in *Screws* 78 L.Ed. at 1498, 325 U.S. at 93. And there is here, too, since Knick used his weapon pretextually with the encouragement of the City and the Chief. There is no difference in the pretextual use of a weapon or a warrant-- both are significant incidents of state power and come to the actor only by virtue of his police status.

B. Domestic Violence as a Custom and Practice of Municipal Police Officers is a Cognizable Interest under the U.S. Constitution and 42 U.S.C. § 1983

As *Collins v. City of Harker Heights, Tex.*, ___U.S.___,112 S.Ct. 1061, 1069 n. 10 (1992) held under *Canton v. Harris,* 489 U.S. 378, 388, 109 S. Ct. 1197, 1204 (1989) a municipality may be held liable where a city employee violates "...another's.." constitutional rights if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation. As applied in this case, the City and the Chief's cumulative training failures violated Lisa Knick's 14th Amendment due process right to be free from state sponsored violence through the sustained, affirmative and arbitrary misuse of a police weapon. Further, as a police officer spouse she should, under the pervasive risk of harm tests cited from the 10th, 8th, lst and D.C. Circuits, be accorded the same protection from constitutional infractions of liberty interests as prisoners or pre-trial detainees, especially where she had tried to protect herself by surrendering the City's weapon.

Police spouses have recently been accorded recognition of this liberty interest. Thus, the District Court in *Czajkowski v. City of Chicago, Ill.*, 810 F.Supp. 1428, 1438-1440 (N.D. Ill., 1992) denied the motion of the City for summary judgment where the City had contended that its officer did not act under color of state law and the officer contended he was acting personally.

Mary Czajkowski sued on behalf of herself and her son, Rubin Czajkowski, Jr. against the City, certain of its officials and her former husband, Officer Rubin Czajkowski. Mrs. Czajkowski and her son were assaulted by her former husband, Officer Czajkowski, when he stopped her car on June 21, 1988 Czajkowski was on duty and he pulled along side his former

wife's car and signalled her to pull over. She did so; he parked his car in front of her car. The parties disagreed as to whether he activated his lights and siren; and they disagreed as to the reason for the stop--Czajkowski saying he pulled her over because she gave him the" finger" and Mary Czajkowski saying she was pulled over for an alleged traffic violation of crossing the yellow line.

With cross-motions for summary judgment before it, the Court resolved the disputes with regard to the defendants' motion in favor of the Plaintiff. On the mixed question of whether the officer was in fact arresting his wife or simply acting out of personal pique, the Court held that it had to be assumed that he was acting to arrest her and that the Plaintiff was reasonably influenced by the fact that her former husband officer was on duty at the time. On the City's motion for summary judgment, the court found that the plaintiffs produced evidence that the Department's disciplinary procedures had been woefully inadequate and had sustained " . . . only a fraction of meritorious cases of excessive force and domestic violence. . . " and ". . . that such improper conduct was unlikely to result in disciplinary conduct was known throughout the Department . . . " and " . . . it was also known in the Department that there was a serious problem of domestic violence against wives of police officers . . . ", 810 F.Supp. at 1439-1440. The District Court in *Czajkowski* had absolutely no problem in finding a protected interest or potential liability for the City.

CONCLUSION

Lisa Knick, now deceased, seeks through her brother the same fair treatment for her estate and surviving infant children that she could have received in seven circuits of this nation but didn't get in the Fourth Circuit by granting the petition for a writ of certiorari and reversing this Court of Appeals ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of November, 1993 in compliance with Rule 29 of the Rules of the Supreme Court of the United States, three true copies of the foregoing Petition for Writ of Certiorari were sent by first class mail, postage prepaid to: William F. Rutherford, Jr., Esq and Randy V. Cargill, Esq., Counsel for Respondents, Woods, Rogers & Hazelgrove. 10 South Jefferson Street, PO Box 14125, Roanoke, VA 24038-4125.

Frank M. Slayton, Esq.

PETITIONER'S APPENDIX

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TABLE OF CONTENTS

A. Opinion in Clinton Edward Vincent, Jr., Administrator for the Estate of Myra Lisa Vincent Knick v. City of Lexington, et al., by the United States District Court for the Western District of Virginia, Kiser, J., Civil # 91-0048-L, August 28, 1992 (unpublished) 3-13

B. Opinion in Clinton Edward Vincent, Jr., Administrator for the Estate of Myra Lisa Vincent Knick v. City of Lexington, et al., by the Fourth Circuit Court of Appeals, per curiam , Record # 92- 2129, September 1st, 1993 (unpublished) 14-19

C. 42 U.S.C. 1983 20

D. Excerpts from City of Lexington Police Department Regulations and General Orders, Section 12.15, effective April 12, 1984 Re: Guidelines for Performing Police Work While Off-Duty 21-22

E. Excerpts from Personnel Records of Jerry Knick23-35

F. Excerpts from Deposition Testimony of Chief Bruce M. Beard, May 6, 1992 36-69

G. Excerpts from Deposition Testimony of Lt. Steven Crowder, May 6, 1992 70-111

H. Excerpts from Deposition Testimony of Sgt. Wayne Straub, May 6, 1992 112-146

I. Lt. Steven Crowder, Deposition Exhibit # 2- Memorandum of April 1, 1991 147-150

A. Opinion in Clinton Edward Vincent, Jr., Administrator for the Estate of Myra Lisa Vincent Knick v. City of Lexington, et al., by the United States District Court for the Western District of Virginia, Kiser, J., Civil # 91-0048-L, August 28, 1992 (unpublished).....

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

LYNCHBURG DIVISION

CLINTON EDWARD VINCENT, JR.,
Administrator for the Estate
of Myra Lisa Vincent

Plaintiff,

v. Civil Action No. 91-0048-L

CITY OF LEXINGTON, A Virginia
Municipal Corporation,

and

BRUCE BEARD, City of
Lexington Police Chief MEMORANDUM OPINION
By Jackson L. Kiser, Judge
Defendants. United States District Court

Plaintiff, Clinton Edward Vincent, Jr., administrator for the Estate of Myra Lisa Vincent Knick, brings this civil rights action pursuant to 42 U.S.C. 1983 ("1983"). Plaintiff seeks compensatory damages, punitive damages and reasonable attorney's fees for wrongful death of Lisa

Vincent Knick. Defendants have filed a motion for Summary Judgment; Plaintiffs have filed an opposition to Defendants' motion; and Defendants have filed a reply to Opposition to Motion for Summary Judgment. Extensive depositions have been given in this case, and oral arguments were heard on August 14, 1992. The motion is now ripe for disposition.

Summary Judgment Standard and Facts

Rule 56(c) provides that a moving party is entitled to summary judgment "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" Fed. R. Civ. P. 56(c). The party moving for summary judgment is initially responsible for identifying those portions of the factual record which it believes establish that there are no genuine issues of material fact. Once the moving party has made this showing, the opposing party must demonstrate, by reference to affidavits, depositions, answers to interrogatories, or admissions, that a triable issue of fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). In deciding a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, (1986).

The following factual account is set forth in accordance with the above standard. On January 29, 1982 Jerry Knick ("Knick") became a policeman for the city of Lexington, Virginia. On September 23, 1985, Knick

received oral counseling for his misuses of a stun gun and a written memo concerning the proper use of the device. On September 20, 1986 Knick married Myra Lisa Vincent Knick ("Lisa"). In the middle 1989 Knick became dissatisfied with the marriage and started having an affair with Cecilia Grubb. In January 1990 Knick went to Charlotte to attend a sex crime school, paid for by City money. Lisa drove to Charlotte, discovered Knick's affair. Knick's and Lisa's marital relationship became strained. Knick became very depressed as a result of his wife's discovery of his infidelity, and Knick attempted to commit suicide in January 1990. After Lisa discovered the affair, she switched cars with Knick because he was driving her car on this trip. Lisa noticed that Knick had left his service revolver in her car, and she gave it to the Lexington Police department when she returned. Lisa did not indicate that she was in any danger; however, she did move out of the marital house for a brief period of time. When Knick returned, he obtained his weapon for the Police Department; no form was filled which was against Department procedure. The Lexington police department became aware of Knick's suicide attempt, but took no actions on Knick's behalf. Additionally, all of the Lexington police officers were aware of Knick's general reputation as a womanizer. Knick was also know to like to practice to draw his loaded gun. Moreover, Knick was the weapon instructor for other Lexington Police officers.

Knick progressed to the rank of patrolman first class in his eight years on the force. He was known as just the kind of officer you would want to back you up. He was also known to have a temper and like a fight. On September 29, 1990 Knick had a marital dispute with his wife Lisa. After Knick left for work, Lisa called over a

friend of the family, Sergeant Alfonzo Miller ("Sergeant Miller"), who was also a member of the Lexington Police Department. About 9:00 p.m. that day, Knick, who was in his police uniform, stopped by his house while he was "on-duty" and asked why Sergeant Miller, who was "off-duty", was at his house. Knick was told that his wife had called Sergeant Miller over, and shortly thereafter Knick left his house. About an hour later, Knick was still "on-duty", returned and asked Sergeant Miller to leave his house. Sergeant Mill left, and Knick was angry that his wife had called Sergeant Miller to his house. Knick had yet another argument with his wife. Unfortunately, Knick lost control and remover his service revolver from its holster. Knick killed Lisa by firing a single round wound to the head. Knick was tried and convicted of second degree murder of his wife.

Bruce M. Beard, Jr. ("Beard") was the chief of police for the city of Lexington. The Lexington Police Department had a policy which allowed police officers to stop by their houses while on duty. Knick, like all of the Lexington police officers, was trained to draw their weapons only on the firing range or when a life is in jeopardy. On January 28, 1982 Knick acknowledged receipt of the Lexington Police Department Procedures Manual which explicitly set for these circumstances. Knick did not follow his Police Department training on the night he fatally shot his wife.

Discussion

Section 1983[1] liability may only be imposed if plaintiff proves that: (1) a person or other qualifying entity (2) acted under color of state law (3) violated a constitutionally protected right or other right secured by federal law and (4) thereby proximately caused an injury to the complaining party. Monroe v. Pape, 365 U.S. 167 (1961), rev'd on other grounds by Monell v. New York City Dept. of Social Services. 436 U.S. 658 (1978).

I. Under Color of State Law Analysis

Section 1983 liability may not be imposed simply on the basis of *respondeat superior*, but it must instead be premised on a finding that person "acted under color of state law." Monell at 691. Thus, the question is whether Knick acted "in his official capacity or while exercising his responsibilities pursuant to state law" when he killed his wife.
West v. Atkins, 487 U.S. 42, 49-50 (1988). The mere assertion that one is a state officer does not necessarily

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[1]Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1983

mean that one acts under color of state law. See. e.g. Polk County v. Dodson, 454 U.S. 312, 317-18 (1981) ("[A] person acts under color of state law only when exercising power 'possessed by virtue of state law and make possible only because the wrongdoer is clothed with the authority of the state.") (quoting United States v. Classic, 313 U.S. 299, 326 (1941); Hughes v. Meyer, 880 F.2d 967, 971 (7th Cir. 1989) ("Not every action by a state official or employee is to be deemed as occurring 'under color' of state law."), cert. denied, 110 S. Ct. 2172 (1990); Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975) ("Acts of police officers in the ambit of their personal, private pursuits fall outside of 42 U.S.C. 1983"; "'it is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law'") (quoting Johnson, 284 F. Supp. at 937), cert. dismissed as improvidently granted, 429 U.S. 118 (1976); Johnson, 284 F. Supp at 936-37 (acts committed by officers while on duty and in uniform as not under color of state law if they are wholly unrelated to the performance of police duties); see also, e.g., Revene v. Charles County Comm'rs, 882 F.2d 870, 872-73 (4th Cir. 1989) (complaint stated claim that defendant deputy sheriff acted under color of law, even though the defendant was off-duty at time of shooting; local ordinance provided that officers were on duty 24 hours per day); Bonsignore v. City of New York, 683 F.2d 635, 638-39 (2d Cir. 1982) (off-duty officer who shot wife and then killed himself was held not to have acted under color of law);; Traver v. Meshriy, 627 F.2d 934, 937-38 (9th Cir. 1980) (off-duty police officer, who was working as a "security teller" pursuant to the police department's secondary hiring program and whose primary

duty in the event of a crime was to the department rather than the bank, was held to have acted under color of law when he detained a customer); Robinson v. Davis, 447 F.2d 753, 758-59 (4th Cir. 1971) (part-time campus security officers who also were part-time town police were held not to have acted under color of law in requesting students to appear at college administrative hearing; it was clear that the officers were acting in their capacity as campus security officers), cert denied, 405 U.S. 979 (1972); Watkins v. Oaklawn Jockey Club, 183 F.2d 440, 442-43 (8th Cir. 1950) (sheriff and deputy who were employed by a private racetrack were held not to have acted under color of law when they acted in their capacity as racetrack employees in ejecting a patron).

It is clear that police officers, who misuse the powers they possess, will be held to have acted under color of state law whether they are on or off-duty. See, e.g., Griffin v. Maryland, 378 U.S. 130, 135 (1964) (Off-duty police officer found to be state actor and acting under color of state law when he dispersed blacks from an amusement park by unconstitutionally arresting them for trespass); Monroe v. Pate, 365 U.S. 167 (1961), rev'd on other grounds by Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) (policemen, who unlawfully arrested, interrogated and detained suspect for ten hours, acted "under color of state law."); Davis v. Murphy, 559 F.2d. 1098 (7th Cir. 1977) (off-duty policemen who shouted racial insults to blacks, and then identified themselves as policemen before severely beating the blacks were held to have acted under color of state law).

Thus, it is plain that Knick's status as a police officer, by itself, is insufficient to satisfy the "color of law" requirement. See Screws v. United States, 325 U.S. 91,

111 (1945) (construing an analogous provision and noting that "acts of officers in the ambit of their personal pursuits are plainly excluded") (plurality opinion); Hughes v. Halifax County School Board, 885 F.2d 183 (4th Cir. 1988), (noting circumstances in which the acts of county workers were not clothed with state authority), cert. denied, 488 U.S. 1042 (1989); Briscoe v. LaHue, 663 F.2d. 713, 721 n.4 (7th Cir. 1981) ("Acts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way 'related to the performance of police duties.'" aff'd, 460 U.S. 325 (1983) (quoting Johnson v. Hackett, 284 F. Supp. 933, 937 (E.D. Pa. 1963).

In Hughes v. Halifax County School Board, 855 F.2d. 183 (4th Cir. 1988), cert. denied, 488 U.S. 1042 (1989), the court considered whether school maintenance employees who assaulted a fellow employee (Hughes) while on duty acted under color of state law within the meaning of Section 1983. Two of the employees taunted Hughes about his participation in a grand jury investigation of thefts by school employees. The taunts culminated in a mock handing of Hughes. Hughes and the other were fired, and Hughes brought suit against the school board and individual perpetrators alleging, among other things, that the employees who assaulted him violated Section 1983. This court granted the defendant's motion for directed verdict but allowed the case to go to the jury solely for the purposes of appeal. The jury found for Hughes on his claim, and this Court granted judgment notwithstanding the verdict on the basis that the perpetrators were not acting under color of state law when they assaulted Hughes.

Hughes appealed and the Fourth Circuit affirmed.

Hughes argues that "he was assaulted, battered and subjected to intentional emotional distress under color of state law because he was accosted by county employees with retaliations in their eyes, on county land, with a county-owned rope, during work hours." Hughes, 855 F.2d at 186. The court rejected this argument. The court specifically distinguished Hughes' case from those involving officials who used their authority as public officials to effect improper arrests or other misconduct. Id. at 186-87. The court concluded: "[i]f the actions of [the perpetrators] amount to state action, any employee of any state who commits a tort has potentially violated Section 1983" Id. 855 F.2d at 187.

Knick's murder of his wife was in no way connected to his duties or responsibilities as a police officer. Knick was not arresting his wife, serving papers, or performing any other police duty. Knick's was not acting under the pretence of the law. Several cases impose Section 1983 liability when police officers "misuse" the power they possess; however, they are not relevant here because Knick did not misuse any power he possessed as a policeman while he was in his home arguing with his wife. Knick was not clothed in indicia of state authority even though he was on duty, was in uniform, and was using his service weapon when he shot and killed his wife. This was a garden variety domestic dispute which had a tragic ending - the fact that Knick was a police officer was incidental and had nothing to do with state authority. Therefore, the plaintiff's claim fails on this ground and I grant summary judgment to the defendants on the Section 1983 claim.

Since there is no state action, I will not address the proximate cause prong of the argument which is the method by which the plaintiff seeks to hold the City of

Lexington liable for failure to train or supervise officer Knick. Absent the 1983 claim, there is no federal jurisdiction. Therefore, I will dismiss without prejudice the state law claims set forth in Counts II and III. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record.

Enter this 28th day of August, 1992.

Jackson L. Kiser
United States District Judge

B. Opinion in Clinton Edward Vincent, Jr., Administrator for the Estate of Myra Lisa Vincent Knick v. City of Lexington, et al., by the Fourth Circuit Court of Appeals, per curiam,Record # 92-2129, September 1st, 1993 (unpublished).....

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CLINTON EDWARD VINCENT, JR.,
Administrator, Estate of Myra Lisa
Vincent Knick,
Plaintiff-Appellant, No.92-2129

v.

CITY OF LEXINGTON, a Virginia
Municipal Corporation; BRUCE
BEARD, City of Lexington Police
Chief,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Virginia, at Lynchburg
Jackson L. Kiser, District Judge.
(CA-91-48-L

Argued: June 10, 1993

Decided: September 1, 1993

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and HAMILTON and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Thomas J. Foltz, Alexandria, Virginia; Franklin M. Slayton, South Boston, Virginia, for Appellant. William Fain Rutherford, Jr., WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellees. ON BRIEF: Randy V. Cargill, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Clinton Vincent, the Administrator of the Estate of Lisa Vincent Knick, filed a civil rights action pursuant to 42 U.S.C. Section 1983 (1988) against the City of Lexington and the Chief of the Lexington Police Department (referred to herein collectively as "the City"). The complaint alleged that the City was liable for Lisa Knick's wrongful death because Jerry Knick, Lisa Knick's husband and an officer of the Lexington Police Department, was acting under color of state law when he

shot and killed his wife. The district court granted summary judgment for the City, and we affirm.

I

This is a tragic case. Jerry Knick was hired as a policeman for the City of Lexington, Virginia in 1982. Four years later he married Lisa Vincent. For our purposes, it is enough to note that the marriage was not a happy one.

On September 29, 1990, a distraught Lisa Knick called Sergeant Miller of the Lexington Police Department and asked him to come to her home. Miller, who was a friend of both Jerry and Lisa Knick, was not on duty at the time and agreed to come to the Knick home. Lisa Knick then told Miller about her dissatisfaction with her marriage. Later Officer Knick, who was on duty at the time, came to his home and was angry to find Miller there. Officer Knick left for about an hour, saying that he would allow his wife and Miller to finish their conversation. Miller was still there when Officer Knick returned. Officer Knick asked Miller to leave, and Miller complied. The Knicks then engaged in a heated argument. At some point, Knick pulled his service revolver from his holster. According to Officer Knick, his wife then grabbed the weapon, causing it to fire one round into her left temple. A jury, sitting in the Circuit Court of Rockbridge County, convicted Knick of second degree murder based on a finding that Officer Knick killed his wife with malice. Jerry Knick is now serving a ten-year term of imprisonment for the murder of his wife.

On September 23, 1991, the Administrator of Lisa Knick's estate filed a suit against the City of Lexington and Chief of Police Beard alleging that under 42 U.S.C.Section 1983 they were legally liable for Lisa Knick's death. The district court determined that Officer Knick was not acting under color of state law when he shot and killed his wife. Because action under color of state law is a necessary finding for the imposition of liability under Section 1983, and finding no material facts in dispute, the district court granted Appellees' summary judgment motion.

II

To state a claim under Section 1983, the appellant must allege the violation of a constitutionally protected right of other right secured by federal law and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Applied to this case, if Knick's murder of his wife was not an action taken "under color of state law," there can be no Section 1983 liability. *Monell v. Dep't of Social Servs.*, 436 U.S. 658,691 (1978). The question is whether Officer Knick acted "in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. at 49-50.

We have no difficulty concluding that Officer Knick's murder of his wife was in no way connected to his duties or responsibilities as a policeman. The only fact distinguishing this murder from other fatal domestic disputes is that Jerry Knick was a policeman. But the Supreme Court has made clear that acts of police officers in the ambit of their personal pursuits are plainly excluded

from the term "color of law." *Screws v. United States*, 325 U.S. 91, 111 (1945). Although Officer Knick was on duty at the time these unfortunate events occurred, he was not acting within the scope of his official duties when he stopped by his house or when he shot his wife.

Citing *Gibson v. Chicago*, 910 F.2d 1510 (7th Cir. 1990), Appellant contends that the City remains subject to Section 1983 liability even absent a finding that Knick acted under color of state law when he shot his wife. Appellant maintains that either the City's failure to adequately train Officer Knick, or its decision to retain Officer Knick on the police force in the face of alleged evidence that he was emotionally unstable, provides a sufficient basis for imposing Section 1983 liability. But even if we agreed with Appellant's reading of *Gibson*, 910 F.2d at 1514 ("Action under color of state law is a jurisdictional prerequisite to a Section 1983 claim.")

As Judge Jackson Kiser stated: "This was a garden variety domestic dispute which had a tragic ending--the fact that Knick was a police officer was incidental and had nothing to do with state authority." (J.A. at 769). We agree, and affirm the district court's disposition of the Section 1983 claim.*

AFFIRMED

---

*Because the Section 1983 Claim provided the basis for federal federal jurisdiction in this action, the district court was correct to dismiss without prejudice Appellant's state law claims.

C. 42 U.S.C. 1983.....

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

D. Excerpts from City of Lexington Police Department Regulations and General Orders, Section 12.15, effective April 12, 1984 Re: Guidelines for Performing Police Work While Off-Duty.....

GENERAL ORDER DATE OF ISSUE APRIL 12, 1984
SUBJECT GUIDELINES FOR PERFORMING POLICE WORK WHILE OFF-DUTY

POLICY:

THE POSITION OF POLICE OFFICER IS A FULL-TIME, TWENTY-FOUR (24) HOUR-A-DAY JOB; AND THE OATH OF OFFICE WHICH THE OFFICER TAKES REQUIRES THAT HE/SHE BE READY AT ALL TIMES TO EXECUTE WHATEVER POLICE ACTION IS NECESSARY. IN SOME CASES THIS ACTION MAY INVOLVE ENDANGERING YOUR LIFE OR PROTECTING THE LIFE OF ANOTHER; HOWEVER, WHEN AN OFFICER IS OFF-DUTY AND OBSERVES A CRIMINAL VIOLATION THERE ARE TIMES WHEN IT IS MORE PRACTICAL AND WISER THAT AN ON-DUTY POLICE OFFICER HANDLE THE CASE. *** *** ***

Signed by BRUCE M. BEARD, JR.
CHIEF OF POLICE

E. Excerpts from Personnel Records of Jerry Knick.....

Exhibit 12-B
CITY OF LEXINGTON
DEPARTMENT OF POLICE
P O BOX 922, 300 EAST WASHINGTON ST.
LEXINGTON, VIRGINIA

TO: Officer Jerry R. Knick
FROM: Lt. B. M. Beard Jr.
DATE: July 22, 1982
SUBJECT: Disciplinary Action (Two Day Suspension Without Pay)

*** *** ***

The charges are based on report and investigation that on July 22, 1982, midnight - 8:00 a.m. shift you were outside the patrol car, with a female and were not on official business. No call was made to the dispatcher as required by Rule #7. You were not giving attention to your duties as a police officer.

*** *** ***

RECEIVED: 7/22/82
2.20 p.m.
/s/ J. Knick

Exhibit 12-c

CITY OF LEXINGTON, VIRGINIA
DEPARTMENT OF POLICE
P O BOX 922, 300 EAST WASHINGTON ST.
LEXINGTON, VIRGINIA

MEMORANDUM

TO: Officer Jerry Knick

FROM: Chief J.A. Kirby

SUBJECT: Probation Period Extended for Six (6) Months

DATE: August 17, 1982

Due to the fact that disciplinary action was taken against you during your six (6) months probation period, for Violation of the Rules & Regulations of this Department, you are hereby placed on probation for six (6) more months.

_____
Major J.A. Kirby
Chief of Police

Exhibit 12-d

Office of
Acting Chief of Police

MEMORANDUM

TO: PO I Jerry Knick

FROM: Acting Chief B.M. Beard, Jr.

SUBJECT: Probationary Period Completed

DATE: April 8, 1983

You have successfully completed your probationary period. Your pay grade will be changed from 11A, $11,798 to 11B, $12,406, to become effective April 7, 1983. Also your rank has changed from PO to PO I. Congratulations!

Lt. B.M. Beard, Jr.
Acting Chief of Police

BMB:jgc

Exhibit 12-f

LEXINGTON POLICE DEPT
FIELD OFFICER'S COPY

OFFENSE REPORT
#3951 ASSAULT & BATTERY (Simple)
6:34 P.M. NOVEMBER 3, 1984
VICTIM: **DEBORAH D. KNICK**

*** *** ***

On date and time above victim states that **Jerry Knick** w/m 27 yrs struck her in the head with his hand two times. This occurred on Miller St. in front of victims's residence. Mr. Knick was gone on the arrival of Sgt. Crowder/Ptl. Neil. Victim needed no medical treatment. Victim secured Assault & Battery warrant for Jerry knick, court date set Nov 12, 1984

Report Received and /s/ by Sgt. S.E. Crowder

Exhibit 12-g
DEPARTMENT OF POLICE
City of Lexington, Va

M E M O R A N D U M

TO: File
FROM: Capt J. A. Kirby
SUBJECT: Oral Counseling on Use of Stun gun and Attitude
DATE: September 23, 1985

Officer Knick was brought into my office on 9/23/85 at 7:55 a.m. He was told he had misused the stun gun when he had arrested subject Davis.

It was pointed out to Officer Knick that he had used the stun gun to intimidate subject Davis while they were at the jail.

*** *** *** I also pointed out the fact that it was a defensive weapon and it was not to be thrust at a subject.

*** *** ***

Officer Knick was counseled on his attitude while dealing with the public on any situation. It was pointed out to him about the resisting and assault and battery charges placed by him against different people, more than any other officer. He replied, "they just do it." I told him he would have to change his attitude.

Exhibit 12-h

DEPARTMENT OF POLICE
City of Lexington, Va.

M E M O R A N D U M

TO: File

FROM: Chief L. O. Sutton

DATE: Sept. 30, 1985

On September 30, 1985 at approximately 2:15 p.m. Officer Jerry Knick was called into the Chief's office and counselled **with regard to his attitude and the effect it is having on his performance.**

A number of incidents were discussed in this counseling session. The most recent one occurring today. Officer Knick failed to take his hat in the car with him and it was not available when needed. Officer Knick also advised a junior officer to "don't worry about it" when the junior officer asked him if he should go to the station and get his hat.

Officer Knick was told that should his present attitude and performance continue more severe disciplinary action will be forthcoming.

LOS/bw

Exhibit 12-i

PERSONNEL CONDUCT REPORT
Department of Police, City of Lexington

To document officially those matters involving adverse or improper personnel conduct brought to the department's attention as the result of citizen compliant, or observed by a supervisor *** *** ***

Employee: **Officer Jerry R. Knick**
Precinct Bureau: Police
Date: 9-11-86

A. BASIS FOR REPORT: **Citizen Complaint**

B. STATEMENT OF INCIDENT:
Failure to assist a citizen on August 3, 1986 by not giving her a ride to Hospital or calling the First Aid to take her. She had requested to get to the Hospital. Violation of Rules and Regulations IV Under 18 and 19.

*** *** ***

Officer or supervisor originating report: Lt. Bruce M. Beard Acting Chief
Witness: Lynn Troutman
Investigating Officer: Capt. J. A. Kirby

FINDINGS AND CONCLUSIONS
*** *** ***

That this report serve as a letter of Reprimand for failure to assist a citizen in time of need when Request was made.

Exhibit 12-1

LEXINGTON POLICE DEPARTMENT
RECORD OF EMPLOYEE COUNSELING

DATE October 12, 1986
RANK Patrolman

NAME Jerry Knick

STATEMENT OF PROBLEM On 10-10-86, Officer **Knick used poor judgement in his failure to follow Sec. 12.11 of the Dept. Procedure Manual,** To Wit: (1) Did not examine his patrol vehicle for dangerous items or contraband prior to or at the end of his shift (2) Did not thoroughly search a prisoner under arrest for DUI.

ACTION TAKEN BY SUPERVISOR On 10-11-86, Sgt. Straub conducted a lengthy counseling session with Officer Knick with regard to the above stated problem. **Officer Knick is given this written Letter of Counseling to insure that there are no future problems of this nature.**

/s/ Sgt. E. W. Straub
SIGNATURE OF SUPERVISOR

/S/ Jerry R. Knick
SIGNATURE OF EMPLOYEE

Exhibit 12-o

PERSONNEL CONDUCT REPORT
Department of Police, Cit of Lexington

To document officially those matters involving adverse or improper personnel conduct brought to the department's attention as the result of citizen compliant, or observed by a supervisor *** *** ***

Employee: **Jerry R. Knick**
Precinct Bureau: Police
Date: 12-16-86

A. BASIS FOR REPORT: **Citizen Complaint**

B. STATEMENT OF INCIDENT:
Violation of the Departmental Rules and Regulations: rule IV, section 4: To Wit: **Unsatisfactory Performance and Violation of Departmental Procedures:** Section 6.06 Ride-Along-Program. On 12-15-86, while working the 4-12 shift, Officer Knick had his Wife, Lisa, riding with him without the required approval as stated above.

*** *** ***

RECOMMENDATION/ACTION/BUREAU COMMAND: It is the recommendation of Sgt. Straub that **Officer Knick be suspended** for (1) day of duty of 12-18-86
/s/ Sgt W. E. Straub
Reviewed B.M. Beard
/s/ Jerry R. Knick

Exhibit 12-x-8

CITY OF LEXINGTON, VIRGINIA
PERFORMANCE EVALUATION

KNICK, JERRY
POLICE OFFICER I
APPRAISAL PERIOD 12-20-88 TO 5-29-89
SUPERVISOR: Richard H. Sutton

*** *** ***

Comments (on Rating Blocks)

In Section A above, the **poor unsatisfactory mark** in working with others reflects Officer Knick's expressed attitude and comments in his unwillingness to work with certain individuals in the department.

In Section A above, **the poor unsatisfactory mark** in reaction to changing demands of the work situation and reflects Officer Knick's unwillingness to work with or around certain individuals when scheduled to do so.

*** *** ***

In Section B above **the poor unsatisfactory marks** in developing teamwork and fairness and objectivity were given for the following reason. An unwillingness to work with or around certain individuals in the department does not promote teamwork Objectivity as defined as a dealing with externals rather than thoughts or feelings, is not being

PERFORMANCE EVALUATION OF PERIOD 12-20-88 TO 5-29-89 OF JERRY KNICK (CONTINUED)

accomplished by Officer Knick.

As recorded on the evaluation dated Dec. 20, 1988 on Officer Knick, in the comment area of the evaluation, Officer Knick has extra responsibility as an assistant supervisor. He has done very well at this however he has been at a point where his actions, judgements, opinions and cooperation with other officers is being duplicated by his peers.

This problem has been in existence through two evaluation periods. Officer knick is the only one who can correct this problem. Officer Knick has had plenty of time to correct this problem, and has been made aware of the problem since the Dec. 20, 1988 evaluation date. This type of unwillingness and attitude cannot be tolerated for it is not healthy or beneficial to a department who needs to function as a team. If this expressed unwillingness and negative attitude continues through this evaluation . . . [lost by copier]

Reviewed and /s/ by Jerry R. Knick 5/29/89
Reviewed and /s/ by Bruce M. Beard, Jr. 5/30/89

Exhibit 12-x-10

CITY OF LEXINGTON, VIRGINIA
PERFORMANCE EVALUATION
KNICK, JERRY R.
PO 1
APPRAISAL PERIOD 12-15-89 TO 6-20-90
RATING SUPERVISOR: SGT. P.H. SUTTON

*** *** ***

Officer Knick rated on a scale of 1 to 7 (low to high):

Knowledge of Job Duties; Quality of Work; Initiative and Drive; **6**

Dependability; **7**
Community Relations; **5**
Working With Other Employees; **5**
Cooperation; **4**
Communication Skills (oral); **5**
Writing Skills; **6**
Reactions of Changing Demands of Work Situations; **4**
Grooming and Health; **7**

SUMMARY
Officer Knick has done a real good job at the police work which he has encountered during this evaluation period. He is an asset to the Lexington Police Dept.
*** *** ***
It is the recommendation of this evaluation that Officer Knick receive a 2.5% merit increase in pay.

DEPOSITION OF:

BRUCE M. BEARD

May 6, 1992

BRUCE M. BEARD, JR.
DIRECT EXAMINATION/ By Mr. Foltz

[At page six]

BY MR. FOLTZ:

Q Chief Beard, my name is Tom Foltz. You have been sitting across from me for the past two days and I am sure you heard Mr. Slayton's preliminary remarks to witnesses.

I would simply indicate that if you don't understand any question that I am asking you let me know and I will try to rephrase it, get some understanding and try to make sure your answers are clear on the Record.

The structure of the deposition today is essentially I am going to have you review certain records. I am going to try to eliminate asking you your recollection of events that several witnesses have testified except with respect to what you specifically know and when you learned it.

I am going to try to break it down into three or four major parts, and one would be essentially the authentication of the documents. The second would be the review of events that we have learned about in deposition testimony and third would be reviewing some of the records in which you know about the incidents described in them.

Do you have any questions for me before we start?

A No, sir.

Q The hour, I realize, is later than you anticipated so I will try to be as brief as I possibly can. Let's get your name for the Record.

A Bruce Beard, Junior.

Q And where do you live?

A 2 Lampe Circle, L-A-M-P-E Circle.

Q Is that in the City of Lexington?

A Yes.

Q And how are you currently employed?

A With the Lexington Police Department, Chief of

Police.

Q How long have you been employed in that capacity?

A I have been Chief of Police a little over five years.

Q And so your testimony is that your tenure as chief began in 1987, is that correct?

A That is correct.

Q Were you acting chief prior to that time?

A Several times.

Q And just if you could, give me a chronology of your employment history. Why don't you do a narrative with Lexington Police Department, when you first started, your positions that you have held, just for the Record.

A I began as a patrol officer March of 1970. I was appointed Acting Chief of Police, I believe it was around September 1982, and that ended around May of 1983. Once again I was appointed Chief of Police sometime around July of 1986, and that ended sometime around the first part of September, 1986.

Q Were you a lieutenant at any time during this process?

A I was promoted to lieutenant in 1974.

Q Were you promoted directly from patrol officer to lieutenant?

A I went through the complete rank structure.

Q Which is?

A Back then, we don't have the same structure now, back then patrolman, corporal, sergeant, lieutenant, captain and chief.

Q Just a little bit about your training, if I can. Your training, your level of education, first of all.

A I am a high school graduate.

Q And your law enforcement training?

A I spent four weeks at the academy, that was the first police academy available to police officers that was made mandatory.

Q And would this have been the result of state law changes?

A That is correct.

Q And this occurred what, approximately 1980?

A No, that was 1972.

Q Now, after your appointment or the beginning of your tenure as chief, not acting chief, did you promulgate regulations?

A I did.

Q I would ask you to identify, if you could, a document entitled "Lexington," well, I mean this is Lexington Police Department Procedure Manual and is defense document numbers 0039, and then starts 001 through 0038. Are those the regulations that you promulgated?

A Yes, they are.

MR. FOLTZ: I would like to move those into evidence as Beard Number One.

MR. CARGILL: I would just note one thing, you apparently have put D0039.

MR. FOLTZ: That is what I have right here.

MR. CARGILL: And the way we understand it, 39 is the cover page for the Procedure Manual and D1 is the cover page for the Rules and Regulations.

MR. FOLTZ: Well, then maybe we should get into that. Are you indicating that there is a Procedure Manual that is different from the Rules and Regulations?

MR. CARGILL: Right, there is a separate Procedure Manual and Rules and Regulations Manual.

THE WITNESS: See, the Rules and Regulations Manual is this thick.

MR. FOLTZ: Oh, well.

MR. CARGILL: When we produced them to you they were in the proper order, 39 precedes 40. One is the coverage page of the Rules and Regulations but D1 through D39, pardon me, 38 is the Rules and Regulations.

MR. FOLTZ: Off the Record.

(Discussion off the Record.)

MR. FOLTZ: Let the Record reflect that Mr. Cargill has directed my attention to the fact that there is a separate Police Department Procedure Manual. What we were seeking to introduce here is the Rules and Regulations of the Lexington Police Department dated August 1989 and identified by Chief Beard as the Rules and Regulations, along with policy statements that run from Pages, under "Goals and Objectives," 0020 to 0038.

BY MR. FOLTZ:

Q Chief Beard, is it your contention that the Goals and Objectives portions of the rules are part of the Rules and Regulations?

A In a way they would be separate.

MR. FOLTZ: Well, let's just stick with the Rules and Regulations, and they are offered, both of these, which are the Rules and Regulations, plus the document entitled, "Lexington Police Department Goals and Objectives," as one consolidated exhibit.

(The above-mentioned document was marked as Deposition Exhibit Number One and entered into the Deposition.)

BY MR. FOLTZ:

Q After you became Chief of Police, did you review existing personnel files?

A When I was actually appointed Chief of Police?

Q Right.

A That is correct.

Q Did you have an opportunity to review Jerry Knick's file?

A Jerry Knick, yes, I did.

Q Along with everybody else?

A Yes.

Q Did you conduct this review on the basis of any particular procedure that you had in mind when you became Chief?

A No.

Q But you did conduct a review of everybody's personnel file?

A Yes.

Q When did you do that?

A I am not sure, I cannot remember. It was shortly after I took office.

Q So you conducted what amounts to a complete review of the departmental personnel records?

A Yes.

Q Would that have been because you finally had total authority to look at everybody's personnel records?

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[At page 16/ Direct Examination/ by Mr. Foltz]

Lisa's apartment where they were living together prior to their marriage, and that she found Jerry Knick with a cocked .357 magnum revolver and that he was apparently expressing suicidal thoughts.

My question is do you know anything about this incident as testified to by Ms. Bowser?

A No, sir.

Q Did you ever come to learn anything about this?

A No, sir.

Q Other than the testimony you have heard in these depositions, have you ever heard anything about this incident?

A No, sir.

Q When did the weapon switch occur from the .357 revolver to the H & K 9mm?

A I can't remember. I do know it was Chief Sutton's tenure, I don't know what year.

Q Again, in 1986, Sergeant Sutton testified that he was summoned by Lisa to the apartment where Jerry and Lisa were living together and talked to Lisa about Jerry's suicide

threat and that when he arrived there, Jerry had left. Do you know anything about this incident?

A No, sir, I have no knowledge of that at all.

Q Other than the deposition testimony that you have heard here today, yesterday and I guess at any other time that you have been present at depositions, did you ever learn about this?

A No, sir.

Q In January of 1990, I would characterize this as three separate incidents, the trip to Charlotte, the weapon surrender and the suicide attempt testified to by Sergeant Straub yesterday, by Officer Sutton and Lieutenant Crowder today.

What did you know and you can specify to each of these basic parts and from whom and when did you learn it.

A All right, start over again.

Q Let's start with the three basic sequences. It is the Charlotte trip, the weapon surrender and the suicide attempt.

A Now, what do you want to know about the Charlotte trip?

Q Well, just why don't we do that? We will take the Charlotte trip. When did you know about that and from whom did you learn about it?

A Now, are you talking about, and I am not picking at you, are you talking about by sending him to school or Jerry getting caught there?

Q We will talk about both, if you can talk about the entire state of your knowledge, about the genesis of it, beginning with the decision to have him go to school to the point where you learned that he was, as you say, "caught."

A As I recall, Jerry came to me and asked to go to this school. I believe that he took the information to Lieutenant Crowder and had a travel voucher fixed up for it and I signed it.

Q Okay. Now, as to his conduct at the school or

during the time he was attending the school, excuse me, I don't know anything about the conduct at the school except for the event from what we heard he got caught, and when did you learn that?

A I believe, and here again, I am not sure, I believe it was the day after.

Q Who told you about that?

A Lieutenant Crowder.

Q Did Lieutenant Crowder phone you or come to see you?

A He came to see me.

Q So it was an in-person, face-to-face communication?

A Yes.

Q Did you also learn at that time of the weapon turn in?

A No, sir.

Q And so when Lieutenant Crowder came to see you, that would have been what day of the week?

A There again, I am not sure.

Q To the best of your recollection refreshed by the exhibit in the previous deposition.

A I have to assume that it was Thursday the 10th.

Q Were you on duty at that point or were you out of town?

A No, I was on duty.

Q And what time of the day did this meeting take place?

A I honestly can't remember.

Q Morning, noon or night?

A Guesstimation, it would be morning.

Q And was this conducted in your police office?

A Yes.

Q So it would be when you first came on duty that morning?

A I am not sure.

Q How long had you discussed this, Jerry Knick's getting caught with Lieutenant Crowder?

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[At page 21/ Direct Examination / By Mr. Foltz]

get caught.

And he told me that Molly had somehow or another contacted Lisa and advised her of this. I didn't become mad, I was upset because I did, I wanted to put an end to Jerry's infidelity but I didn't want to do it that way. So I expressed that to him.

Q Did you ask him to write a report?

A No.

Q If any other officer had come to you and reported these activities about any other police officer, would you have asked him to write a report?

A No.

Q Let's go on to the weapon surrender. You say you were on duty that week; is that correct?

A Yes.

Q When did you learn about the weapon surrender and what did you learn?

A I have racked my brains out about this, Tom. The Lieutenant said he told me about the gun incident. I do not remember it, at least no bells, no flags went up.

Q Let's try the suicide attempt, you know the one that I am referring to, the one that took place or suicide talk took place, I believe it was shortly after Jerry Knick came back. When did you learn about that?

A After the fact.

Q When after the fact?

A During the state police investigation.

Q Under your Rules and Regulations, are officers required to report incidents involving misconduct of other officers?

A Yes.

Q And if you found out about these incidents,

contemporaneously with their occurrence and they did not file a report, would that be a violation of the Rules and Regulations?

A Yes.

Q So that when Lieutenant Crowder came to you and told you about the Charlotte trip and did not file a report, would that have been a violation of the Rules and Regulations?

A Yes.

Q And what action did you take against Lieutenant Crowder for his failure to report?

A None.

Q When did you learn about the testimony about the weapon surrender? You said you learned about that after the fact. Your testimony was, I am not trying to confuse you here, what you just said two to three minutes ago, learned about the weapon surrender. When was that you said you learned about that?

A I didn't say when I learned about the weapon surrender.

Q You didn't learn about it?

A I am --

Q It is your testimony that you knew absolutely nothing about Lisa coming down to the police station with Jerry's weapon?

A No, sir.

Q When did you first discuss the incident in Charlotte with Officer Knick?

A Okay; according to the schedule and, I have to rely on the schedule, Officer Knick reported for duty at 4:00 P.M. on Monday the 15th of January.

Q So it would be your testimony that you discussed this with him at 4:00 P.M. when he first reported?

A Shortly thereafter.

Q What was the procedure when officers show up to report for their shift at that time in Lexington?

A Well, basically I called, they were all called, you

come into a room, you have probably heard it, officer's room they call it, and we discuss events of the day, problems, possible problems, things to look out for, things like that. This would be when I would have called Jerry over to my office.

Q Now, how far is your office from this officer's room?

A Across two halls.

Q And would you have gone into your office and discussed this with him?

A Yes.

Q Did you do so on this occasion?

A Yes.

Q What specifically did you say to him and what did he say to you?

A I said, "Jerry."

Q Your best recollection.

A I said, "Jerry," I said, "I understand you had a problem while you were in Charlotte with," I don't know whether I said her name or not, Debbie Potter, I believe it was, "and that Lisa came down and caught you."

He said yes. He said, "That is true."

I said, "Jerry, to the best of my knowledge, I am not going to take any disciplinary action against you for having Debbie Potter down in the room with you." I further told him that, "I want you to tell me the truth."

I said, "Did you complete the training that you went down there for?" And he said yes. At that time as I recall it, tears weld up in Jerry's eyes. And he says that, "I have been unfair to Lisa, I have been unfair to my children." And he says, "I am going to seek counseling and get my life and marriage straightened out." And basically that was the end of it.

Q After that session, it is my understanding there was no written report filed; is that correct?

A Now, what kind of written report?

Q Any kind of memorandum that you might have

made regarding this conversation.

A No.

Q And you didn't place anything in his personnel file about this.

A No.

Q Did you inform his supervisor of the action that he proposed to take?

A The only conversation, as I recall it, Rick Sutton approached me and asked me what was the status on Jerry. I advised him that we had talked, he had promised me that he was going to seek counseling and that he was going to treat Lisa better and be better to his children.

Q Let me direct your attention to the, if I could, to an evaluation that was performed, I believe by you

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[At page 28/ Direct Examination/ By Mr. Foltz]

officer, "What do you think about him professionally?" They said, "He is fine. He is the kind of officer you want for backup." They say he is fine.

And so that is what I am trying to find out here, is this assessment incorrect as a whole?

A Are you talking about this one right here?

Q Right.

A No.

Q Getting back to 1990, you didn't write him up for any of the conduct in Charlotte; is that correct?

A That is correct.

Q Now, did he indicate to you how he was going to get counseling?

A The only thing that I recall is the word "counseling," that he was going to seek it.

Q Did you ask him for the name of the counselor?

A No.

Q Did you ask him for a written report from the counselor?

A No.

Q Did you ask him to produce evidence of his attendance at counseling?

A No.

Q Did you meet with him after that to review his progress in counseling?

A No.

Q Did you communicate these facts, the ones I have just asked you about, the course of counseling to his supervisor?

A No.

Q Now, with regard to any of the three suicide attempts I have alluded to in my questioning and two of them you have indicated that you had no knowledge of, the ones in 1986, and the one in 1990 you indicated that you learned about only after the state police investigation occurred as a result of Lisa's shooting, based on your examination of the employment records, are there any written records made of such incidents?

A Please define "such."

Q Written records which would be in the personnel records that I have asked you to take a look at.

A Pertaining to what?

Q The suicide attempts.

A No.

Q Or of the counseling recommendations for the 1990 incident, any record whatsoever?

A No.

Q Directing your attention, if I can, to Exhibit

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[At page 33/ Direct Examination/ By Mr. Foltz]

supervisor in and talk to him about it.

Q If you signed your name, "Reviewed by" and you didn't write anything on the employee performance evaluation that indicated that you disagreed, is it fair to assume that you agreed with it?

A Yes.

Q So if I don't see any initials on there about the

merit increase, "BMB, disagree," I can presume that you would have agreed with this assessment?

A That is correct.

Q Again, that is based on your testimony that you knew nothing of the suicide attempts or suicide references in 1986 that have been referred to in the testimony here.

You have heard testimony from Sergeant Straub and others about the existence of a, I should be more specific about others, I think it would probably be Sergeant Miller most specifically, about the existence of a tape of a phone call received by Lisa Knick.

Do you know anything about the existence of this tape and if you do, when did you learn about it?

A I learned about the tape, yes, I do know about the tape. I haven't heard it but I learned about the tape from Sergeant Straub and I can't recall when that was. It was probably March or so.

Q Of what year, 1990?

A Of 1991.

Q March of 1991. And in what connection did you learn about it?

A I had asked anyone who had any knowledge of the incident involving Jerry Knick's death to give me a report on it.

Q When you took, did you take reports from all the officers who had information?

A I took the reports from the ones that --

Q That came forward?

A Right.

Q Were some of those oral?

A No, most of them were in writing.

Q Did you issue a memorandum requesting these reports in writing?

A Well, I basically knew who to go to get them, the ones involved that night before.

Q Did you go contact them personally?

A Yes.

Q When did you do that?

A I don't know, sometime -- I just don't know.

Q Why did you decide if the state police were

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[At page 36/ Direct Examination/ by Mr. Foltz]

Q Did you ever take any steps to obtain the tape?

A No.

Q Did you ever ask anyone who had the tape?

A No.

Q You may have answered this, when did you learn of the existence of the tape?

A That would be in my investigation for the insurance company.

Q After learning about the existence of the tape, were you required by anyone to go obtain it, by anyone meaning including the insurance company?

A No.

Q Do you know where the tape is currently, based on what you have heard here in the depositions?

A Rumors is that it is at Bernard Natkin's office, an attorney in Lexington.

Q Did you ever contact Lieutenant Crowder's wife?

A No.

Q Did you ever see her at any police gatherings after this, after the Charlotte incident? Is that no?

A I don't recall.

Q Let me ask you a little bit more about the

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[At page 38/ Direct Examination/ By Mr. Foltz]

Q Let's go to Mr. Knick's employment records. With respect to his hiring in 1982, were you familiar at that time with the background investigation procedures then in effect in the City of Lexington?

A Can you explain that?

Q Did you know anything about how people got

checked out when they applied for city employment?

A Basically an officer with superior rank would do a background investigation. I have done them, I did not do the one on Jerry Knick.

Q Do you have any knowledge at all about his previous employment at the Staunton Correctional Center?

A The only thing I have heard is what we have had here in the depositions.

Q So it is your testimony then that the, I guess the testimony of the former Mrs. Knick that he may have been terminated from Staunton is news to you; is that correct, is this the first time you have heard it in deposition?

A Yes, sir.

Q Are the materials for the competition for the position for sergeant which Officer Knick was a candidate in his personnel file?

A I don't think so, I think that they were just given, handed to them.

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[At page 45/ Direct Examination/ By Mr. Foltz]

Number 582, the September 23rd, 1985 memorandum to the file from Captain J. A. Kirby about the oral counseling and use of stun gun and attitude?

Was that memorandum provided to the Rockbridge County Mental Health?

A No.

Q How about the next one, 00583, on attitude counseling?

A No.

Q Now, let's go to the stun gun incident itself which we have just taken a look at it, the memorandum regarding that. What did I say, 583, 528.

You have heard testimony from Sergeant Straub and Lieutenant Crowder about the existence of pictures of the victim. Have you ever seen those pictures?

A No.

Q Do you know if they would have been taken pursuant to any official policy?

A I don't know.

Q Well, at that time, that is September 1985, your position was not that of Chief or Acting Chief, was it?

A No, sir.

Q You were a lieutenant?

A Yes, sir.

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[At page 47/ Direct Examination/ by Mr. Foltz]

A That is a hard question for me to answer, I don't know.

Q If those pictures had been in existence in 1987 during the sergeant's promotion competition and you knew about them, would you have provided them to the psychological assessment individual?

A No.

Q Why not?

A I just wouldn't.

Q Prior to the shooting of September 29, 1990, did the line supervisor, by that I mean the sergeants, receive any information on how to make psychological assessments of a subordinate?

A Yes.

Q And prior to September 29, 1991, September 29, 1990, prior to that time?

A I am sorry, no.

Q Or fitness for duty?

A No.

Q We have heard some testimony here today, I believe from Sergeant Miller, with regard to a session which occurred at the Courthouse, maybe you could help us out a little bit on that. Do you remember the day that that occurred? There was a memorandum issued, I believe October 17, 1990.

A Are you referring to a debriefing?

Q Not the debriefing, no. The October 17, 1990 memorandum with regard to psychological counseling.

MR. CARGILL: You mean new policy?

BY MR. FOLTZ:

Q New policy, right, this one right here, that has been marked for identification in previous depositions, Miller One. Do you recollect any training sessions conducted pursuant to that?

A Yes.

Q Where were they conducted?

A In the, at that time it was the courtroom. Now we call it the meeting room. It is upstairs at City Hall.

Q And who conducted it, I think we have heard the name from Officer Miller.

A Karen Seibel.

Q How long was this training or how long was this session, excuse me.

A Hour to an hour and a half.

Q Were there any examinations given?

A No.

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[At page 50/ Direct Examination/ By Mr. Foltz]

A Basically some handouts were given, the doctor or whatever her title is gave some signs to look out for.

Q And that handout, would that be the only handout?

A No, this doesn't pertain to that.

Q Do you keep a copy of the handout?

A I should have one.

Q Is it possible for you to furnish a copy if you can go back and find one?

A I will try my best.

Q I know this is one of those evolving processes which you get in and you find you need another document and you are asking the witness who has been here forever to go back and try to find something else. I appreciate your

cooperation on that.

Based on that, and based on the fact that this seminar or session was held after Lisa Knick's shooting, could Sergeant Miller conduct an assessment of Jerry Knick's fitness for duty after he returned from Charlotte?

A No.

Q Do you make any contention whatsoever that Jerry Knick, let me rephrase this carefully, did not receive city funds for his attendance at the Charlotte training school?

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[At page 51-52/ Direct Examination / by Mr. Foltz]

Q Did you ever ask him to reimburse the department for his expenses there?

A No.

Q Directing your attention, if I can, to Exhibit 12X, the June 20, 1990 evaluation, excuse me, that is the last one in this right here, that is Bates Stamp Page Number 527, beginning with 527.

I note there that there is a recommendation for a 2.5 merit increase. That is at Page 532.

A Yes.

Q And that you have, did you concur in that?

A Yes.

Q Did you sign off on that at this point?

A No, this is just, it would be signed off on a payroll change notice. I don't know whether it is in there or not. Let me explain that if I may.

Q Go ahead.

A The situation within the City of Lexington is based on two raises, a cost of living raise and a merit raise.

Q Okay.

A The cost of living raise, we have no way of knowing that until the budget preparation comes out sometime in June and it goes into effect sometime in July. Now, anyone that has a satisfactory performance evaluation is automatically given a 2.5 percent merit increase.

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[At page 55/ Direct Examination/ by Mr. Foltz]

BY MR. FOLTZ:

Q When did you start keeping these kind of productivity sheets, do you know, as Chief, I mean?

A We had sheets like this ever since I have been on the department. They have been revised but it is basically the same.

Q We have had some testimony that fixes the date of the shooting, so I don't need to run through the week of January 8 through the 14th, I think that is pretty much conceded he was at school that week.

I do need to have you review the initials, I have been unable to identify whose initials they are. Are you familiar with those initials?

A They would be my secretary. She does the payroll.

Q Do you review those sheets at all, does she come to you and say, "Hey, the payroll sheets are here, take a look"?

A The only time she comes to me is when she feels like she has a problem, a discrepancy or something.

Q Let me direct your attention, if I can, to the week of September 24 to 30, that is all the way to the back here, back here. Now, I would like you to examine the entry for September 29, 1990 with regard to Officer Knick. When

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[At page 57/ Direct Examination/ by Mr. Foltz]

P.M. on Sunday?

A I don't know.

Q Do you know based on that whether he, in fact, did show up for work on Sunday, the day after the murder?

A Definitely not.

Q So is it your testimony that that entry or those time sheets are incorrect?

A Definitely.

Q I just wanted to find out because I am looking at a document that looks like he went to work the day of the

murder.

A Right, this is something that I would definitely look into.

Q This is the first time you have seen that; is that correct?

A Yes.

Q And your secretary didn't bring it to your attention, I mean I am not faulting her.

A Right. What she does, she has to base it on the supervisor's, his going over it. Something happened here, there is no doubt about it.

Q Let me direct your attention, if I could, to another book that we here, maybe we can try to get down to this. This is a series of records that Lieutenant Crowder

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[At page 61/ Direct Examination/ by Mr. Foltz]

have an open-door policy. Here is a community meeting in which everybody is expressing themselves. You are Mr. Open Door, you don't show up at the meeting which essentially looks like an open-door meeting, if you can understand my question here.

Given the fact that you have an open-door policy of management, why didn't you go in light of that policy?

A I elected not to.

Q Did anybody make a report back to you about statements made at that meeting?

A No.

Q Oral or written report?

A There may have been some oral ones but I don't recall.

Q Did anybody come back to you after the meeting and say, "So and so said this about Jerry Knick"?

A I cannot recall.

Q Lieutenant Crowder prepared a memorandum for you regarding his knowledge of the events of the shooting. Did you ever ask him as your second in command to report to

you about what got said at the debriefing?

A No.

Q Did you ever receive a report from either the Waynesboro or Augusta law enforcement officials who were apparently in charge of running the debriefing about what happened?

A No.

Q What then is the nature of the procedure to be used at a debriefing?

A Like I say, it was just a benefit that I set up. If anyone needed these services they were welcome to go.

Q When you say "these services," you are talking about just the opportunity to go talk about it?

A Exactly.

Q Were there any trained mental health personnel at that debriefing, to your knowledge?

A Not to my knowledge but I am assuming there were.

Q How can you assume that?

A This, I believe this is sponsored by Mental Health, I am not sure.

Q You believe this is sponsored by Mental Health. At the time it was your idea but you are not sure who it was sponsored by? I am trying to interpret how this happened. How did you decide how to convene this debriefing?

A I don't recall.

Q You have heard testimony from Fred Smith that he was fired and later reinstated for an alleged off-duty fight in Buena Vista. And that B. J. Bowser was placed on administrative leave for apparently a nervous breakdown; is that correct?

A That is correct.

Q How do you reconcile or how do you, I guess the question is how do you compare what happened in Officer Knick's case, by that I mean the entire course of conduct after Charlotte, with what happened to Officer Fred Smith and

Officer Bowser as a matter of department policy?

A There is no comparison.

Q When you say there is no comparison, is Jerry Knick's situation unique?

A There was nothing there to indicate that Jerry Knick had a problem that I knew of.

Q Let's go back to the policy or the Rules and Regulations. Paragraph Two, Immoral Conduct, can you read that for me or just review that for the time being?

A Okay.

Q Now, for the Record, I will simply indicate that conduct, "Members shall maintain a level of moral conduct in their personal and business affairs in keeping with the highest standards of the law enforcement profession. They shall not participate in any incident involving moral

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[At page 64-65/Direct Examination/ by Mr. Foltz]

Q You indicated in your earlier testimony your desire to help him stop his womanizing; is that correct?

A That is correct.

Q You wanted him to get counseling; is that correct?

A That is correct.

Q It is your testimony now that his womanizing was not moral turpitude sufficient to impair the ability of the department to function?

A I didn't have enough evidence to discipline him.

Q What would it take to discipline him? He, what would it take, what would it take to discipline him for moral turpitude?

A Okay, I heard in the deposition, I believe Officer Burgdorf brought this up, that he observed Debbie Potter in a patrol car with Officer Knick. That there is a reflection of the Police Department in its operations. That would be enough to discipline him.

Q But he is going to Charlotte taking police, taking police funds and having a woman stay with him who is not his

wife, and his admission that he was caught, that doesn't bring moral turpitude on the department?

A The way it was handled it doesn't.

Q You have heard testimony indicating it was common knowledge on the street that this had happened; is that correct?

A Yes.

Q I mean, people have testified that they heard it on the street, that this was going on.

A Well, I have no knowledge of what people heard on the street.

Q Let me ask you more specifically, what kind of contact do you maintain with members of the community other than members of the Police Department?

A I have a good relationship with the community. I talk to a lot of the merchants, a lot of the citizens in all parts of the city.

Q And did any of them express to you any knowledge of these activities?

A No.

Q So as far as you are concerned, the non police community in the City of Lexington had no knowledge of this generally?

A If they did, they did not express it to me.

Q How long was Jerry Knick carried on the City of Lexington's payroll after the shooting?

A I would have to check on that but I believe he was dropped on administrative leave without pay as soon as

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[At page 70/ Direct Examination/ by Mr. Foltz]

to go out of here?

THE WITNESS: No.

(Conference with counsel.)

THE WITNESS: Now, please restate your question.

BY MR. FOLTZ:

Q Why didn't you terminate him?

A I have got the letter here somewhere that I had our city attorney, Bill Roberts to draw up. I terminated him.

Q You did terminate him?

A I am sorry, it was a letter of termination drawn up by our city attorney, Bill Roberts.

Q Well, was it sent, did he receive it?

A I was advised by my superior that since there was litigation that Officer Knick remain on administrative leave until the outcome of the trial.

Q Who was your superior that so advised you?

A This would be, back then we were in between city managers, David Woody would be the Acting City Manager back then.

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[At page 72/ Direct Examination/ by Mr. Foltz]

there, he is there; that is correct?

A Right.

Q And how much interaction takes place between --

A Between me and the City Manager?

Q Yes, how often do you see him?

A Like I say, sometimes I see him on a daily basis, but we do have formal, and they are called staff meetings, monthly.

Q But basically the level of review is not extensively supervisory; is that correct? In other words, he is not down there meddling in your department every day; is that correct?

A No, sir, he doesn't meddle.

Q He pretty much lets you run the department as you will?

A Yes.

Q And you have been given what amounts to delegation for final policy making authority; is that correct?

A Yes.

Q Now, to your knowledge, did the City of Lexington

Police Department conduct an investigation of the police incident report in connection with the Debbie Gibson allegation of assault, which is Exhibit 00581 that has been offered in other depositions?

A I don't know.

Q You have heard Lieutenant, then Sergeant Crowder indicate his understanding of what happened then. Were you knowledgeable about city investigatory procedures at that point, city police investigatory procedures? I mean, you with a lieutenant by that time.

A Can you go into detail?

Q Let me be more specific and not try to be coy. I am trying to find out if the City Police Department would have conducted an independent investigation after an allegation of domestic assault by one of its officers against a spouse independently, even if she dropped the warrant?

A I can't second guess or say what Chief Sutton would do.

Q Is it your testimony, then, that it would be entirely a discretionary decision, that there was no requirement, to your knowledge, at that point to conduct an investigation independent of the criminal warrant process?

A You are talking about police officers?

Q Right.

A I don't understand what you are --

Q My question is here is a wife of a police officer who files an incident report alleging assault conducted against her by her husband. She doesn't decide to pursue the warrant or appears not to. Would you then or at any time conduct an independent investigation?

A If she would not pursue the warrant, I am assuming then that it would not be investigated any further.

Q Let me ask you about your policy since the filing of this lawsuit, would there be any change now in terms of the Police Department's investigation if a spouse came in --

MR. CARGILL: Same standing objection about

subsequent remedial measures, but go ahead and answer the question.

THE WITNESS: I am sorry, I lost the question.

BY MR. FOLTZ:

Q You were listening to the objection, the standing objection. I am asking the question because I want to find out if there has been a change in the policy here. It is now after the shooting on September 29, 1990, the murder. If the spouse of a police officer lodges a formal criminal complaint, warrant, of assault, a warrant is issued. But she decides or even he, who knows, decides to drop the warrant, would you then conduct an independent investigation?

A There are many different circumstances, probably it would be considered a private matter between husband and wife unless she filed an official complaint against her husband with the Police Department.

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[At page 76/ Direct Examination / By Mr. Foltz]

that"?

A No.

Q Let me ask you with regard to your knowledge of Jerry Knick's handling of a service weapon. You have heard reports, principally from Sergeant Straub about his quick-draw actions apparently in the officer's room or I guess you call a day room. Did you ever hear of such reports?

A Not until today. That is a serious policy violation, in my opinion.

Q Did you ever personally observe them?

A No.

Q Does the policy of your department require an officer to report the violations of departmental rules and regulations to you?

A When?

Q In other words, if an officer sees another officer doing this sort of thing and knows it is a violation, is he under an obligation to report it to you?

A Yes.

Q If it came to your attention that you found out Officer A was guilty of a rule infraction and Officer B was failing to report it, would you discipline both of them?

A Yes.

Q Have you ever done so in connection with any of the events with regard to Jerry Knick?

A No.

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[At page 78/ Cross Examination/ By Mr. Cargill]

CROSS EXAMINATION

BY MR. CARGILL:

Q Chief Beard, can you, as Chief of Police, discipline an officer based on rumor?

A No, sir.

Q Do you feel it is your obligation as a supervisor to provide your subordinates with the fundamentals of due process before you discipline them?

A Yes; you see, and I am sure you all are aware of this, the police officers are protected under the Policeman's Bill of Rights and also the City Manager's grievance procedure. And if you don't have your evidence and your case solid, you are in trouble, especially for a capital offense, dismissal.

Q And by capital offense you mean in terms of dismissal rather than death penalty?

A Yes.

Q When B. J. Bowser was placed on administrative leave following her hospitalization, was that in any way a disciplinary measure taken against her?

A Not at all.

Q Why was she placed on administrative leave?

A For her wellbeing and the Police Department's wellbeing.

Q Would you explain that, please?

A Without the information in front of me, it is my understanding that and I have knowledge of it, that B. J. had

problems, I believe diagnosed as a nervous breakdown. I believe she was taken to the hospital by the Lexington life saving crew.

When this was brought to my attention, her firearm was taken into custody by her brother who assured us that she would not get it. We didn't want to add insult to injury and take it away from her and her thinking that her job was in jeopardy.

And also B. J., or Betty, she ran out of sick leave and we, the City of Lexington Police Department, extended her sick leave and she kept her paycheck without losing any pay.

Q So in essence she was given a favor by the city in that she was paid when ordinarily she wouldn't be paid for time while she was recuperating from her nervous breakdown, correct?

A That is correct, by her own election and maybe the need for, she had used up all her sick leave.

Q And you didn't actually accept her back on the force as a functioning police woman until you got a clean bill of health from a psychiatrist?

A That is correct, and that letter is in her file.

Q Now, with respect to Officer Fred Smith, when he was disciplined, and in fact terminated by you for fighting in Buena Vista, was that an incident that reflected on his ability to perform his duties as a police officer?

A Definitely. That was street talk and it was a poor reflection on the Police Department because of the agressiveness.

Q Did you conduct an investigation of that incident?

A I did.

Q And did the investigating officer conclude that Mr. Smith, had, in fact, fought somebody in public in Buena Vista?

A I was the investigating officer.

Q Did you reach that conclusion?

A I did.

Q Did Mr. Smith actually beat somebody up?

A He did. I had his, still have the victim's bloody handkerchief.

Q That occurred at a public facility in Buena Vista?

A Public street.

Q So in your mind, the incident with B. J. Bowser and Fred Smith bore no relationship to what happened with Officer Knick when he was with this Debbie Potter down in North Carolina, correct?

A That is correct.

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[At page 82/ Cross Examination/ By Mr. Cargill]

he had a or members of his family or his wife's family had a cottage somewhere, I believe in North Carolina, Nags Head, in that area, and he was excited about, I don't know when they were going, going down for a break or on vacation. He had nothing but pleasant things to say about his wife and his family.

Q Did you have any indication at all during that time period that Mr. Knick was not fit to perform his duties as a policeman?

A Not at all. As a matter of fact, I sent Jerry to sniper school and if I had any evidence, any indication at all that he had any psychological problem, certainly I would not put a rifle with a scope on it to take out a sniper in the hands of someone unstable.

Q Now, in all the time that you knew Jerry Knick while you were at the department, did you ever have any doubts about his fitness to perform his duties as a policeman?

A No.

Q And if you had, would you have pulled him off the line and taken his weapon away?

A I would have.

Q Did you ever receive a report from any of his supervisors or anyone in the department that they felt that Mr. Knick was not fit to perform his duties?

A No.

Q And if you had, I take it, you would have taken action, correct?

A Yes.

Q There has been a not-so-thinly veiled allegation that you treated Mr. Knick with some favoritism. How do you respond to that accusation?

A I don't recall any favoritism. I try to treat all my officers alike.

Q Isn't it true that you, in fact, and the personal file will bear this out, that you, in fact, disciplined Jerry Knick on occasion, did you not?

A Yes, I did.

Q Did you not discipline him for, for example, for allowing his wife, Lisa, to ride in the patrol car with him?

A Yes, I did.

Q And when you wrote the first report on him, that February 4 through August 14, 1982 report, his probationary period had been extended, had it not?

A Yes.

Q So in your mind, is there anything to the allegation that he was treated with favoritism?

A Not at all, no, sir.

Q Can you think of any instance of conduct on Mr. Knick's part that you overlooked that you would not have overlooked in another officer?

A No, sir.

Q And particularly on the North Carolina incident where you had information that he had been with another woman down in North Carolina, with respect to that incident, if that same incident had occurred with another officer, would you have handled it any differently?

A No.

Q Did you have any evidence that he misused Government funds on this trip?

A No.

Q Would the explanation have been the same if he had been with his wife or his brother or any other person had he gone down to the training center?

A Yes, because motel rooms as a rule when you go to a conference, the single and double rooms are the same price.

Q And of course, he is only reimbursed for his own meals, correct?

A That is correct.

Q And he is reimbursed for his own mileage?

A In this case he was not.

Q Because he drove his own vehicle?

A That's right.

Q So the only expenses that were reimbursed in this case were the hotel bill and his meals and of course the fee for the school?

A That is correct.

Q When you spoke with Mr. Knick following the North Carolina incident, and you ascertained that he was getting counseling, did you believe that he was sincere about that?

A Yes, I did; and he wasn't crying but tears was weld up in his eyes.

Q And did you after that point ascertain that he was going to get counseling?

A After Jerry told me that he was going, I would see him early in the morning. This is not normal to see him at that time of the morning.

MR. FOLTZ: I think that has been asked and answered already.

BY MR. CARGILL:

Q Did you, after that point, have occasion to see him and him tell you that he was getting counseling?

A After that?

Q Yes.

A No.

Q Did you at any point see him and have a conversation with him about his getting counseling?

A No, nothing after that.

Q When you say "after that," to what are you referring? Are you referring to the first conversation you had with him?

A That is correct, yes.

Q After that first meeting that you had with him in your office following the North Carolina incident, did you not have a time where you saw him either going to go get the counseling or where he told you he was going to get the counseling?

A I did see his personal car in that area.

Q At the place where he would get the counseling?

A That is correct; and another thing, too, the city did not provide funding for this counseling and really had no control over it. It was a private counseling that I assumed he and Lisa worked out. I do not know that for a fact.

Q But you had no indications of any marital problems after that?

A None.

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[At page 90/ Cross Examination by Mr. Cargill]

A That is correct.

Q In essence is it fair to say that these officers everyday make decisions regarding people's competence and fitness, is that not fair to say?

A You are talking within the Police Department, within or without?

Q Within or without.

A Yes.

Q When they deal with the public, they have to be able to identify people who are drunk, correct?

A That is correct.

Q People who are under the influence of drugs, correct?

A Correct, sir.

Q So that is part of their training and part of their everyday duty, correct?

A Right.

MR. CARGILL: I don't think I have any more questions.

REDIRECT EXAMINATION

BY MR. FOLTZ:

Q If I may, it is my recollection of your direct testimony that with regard to the Charlotte trip, Jerry Knick got the money up front; is that correct?

A That is correct.

Q It would be fair to say that there was no reimbursement here, is that correct? In other words, he wasn't reimbursed for anything, he got the money up front?

A Right.

Q You said you wanted to check the records when you got back?

A Yes.

Q Now, regarding Mr. Cargill's assertion that police officers have to make judgments about ordinary citizens every day, do ordinary citizens have the right to carry weapons, are they privileged to use weapons on a daily basis?

A Well, I am not being smart with you but they have the right to bear arms.

Q How about concealed weapons?

A They can by permit only.

Q So in terms of making an assessment of one group of citizens called police officers who have an absolute privilege to carry a weapon and another group of citizens who are not police officers who have a limited privilege to carry weapons, wouldn't you say that in terms of assessing and making judgments on police officers, that fellow police officers have to

have more training than making assessments on ordinary citizens?

A No.

MR. FOLTZ: I think that ends it.

MR. CARGILL: You know the deal.

THE WITNESS: I will waive.

(7:35 P.M.)

CERTIFICATE

COMMONWEALTH OF VIRGINIA
CITY OF ROANOKE

I, Katherine P. Ford, Notary Public in and for the Commonwealth of Virginia, at Large, do hereby certify that the deposition of BRUCE M. BEARD was by me reduced to machine shorthand in the presence of the witness, afterwards transcribed under my direction by means of computer, and that to the best of my ability, the foregoing is a true and correct transcript of the deposition so given by him as aforesaid.

I further certify that this deposition was taken at the time and place in the foregoing caption specified.

I further certify that I am not a relative, counsel or attorney for either party or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand at Roanoke, Virginia, on this the 8th day of May, 1992.

_____

Katherine P. Ford
Notary Public

My Commission expires February 28, 1995.

DEPOSITION OF:

STEVEN E. CROWDER

May 6, 1992

May 6, 1992
2:30 P.M.
DEPOSITION OF:
STEVEN E. CROWDER
Roanoke, Virginia

*** *** *** *** *** ***

[At page four/Cross Examination/ By Mr. Slayton]

BY MR. SLAYTON:

Q State your name, please.

A Steven E. Crowder.

Q What is your address?

A Home address?

Q Yes, sir.

A Route 5, Box 328 A, Lexington.

Q What is your educational background?

A High school graduate and approximately a year and a half of college.

Q How long have you been employed by the Police Department of the City of Lexington?

A Since July of 1982; I think it was July.

Q Did you serve for a while as a sergeant?

A Yes, sir.

Q How long were you a sergeant?

A Approximately three years.

Q And when were you promoted to the rank of Lieutenant?

A 1987, April 1987.

Pg. 5 Q Here is a field report that dealt with a complaint by Deborah K. Knick and ask you if you are familiar with that?

A Yes, sir.

Q Tell us the circumstances under which that was investigated by you as sergeant.

A Other than just being able to read it it is not much that I am going to be able to recall from it as far as what took place and what was said and things like that.

Q Let me ask you this: Did you know Debbie Knick at the time?

A Other than being Jerry's wife, no, sir.

Q That is what I was leading up to, you knew that she was Jerry's wife?

A Yes, sir.

Q Was he employed by the Lexington City Police Department at that time?

A Yes, sir.

Q Were you his supervisor?

A I don't think so.

Q What was his position with the Lexington City Police Department?

A He was a patrol officer.

Q Tell us just what you remember about that incident.

Pg. 6 A Other than being called to the scene, I remember that I was called to the scene, that Jerry had assaulted his wife and obviously she wanted to make a complaint. I don't recall who called me but I remember going to the scene and talking to her and taking this offense report at the scene and then advising Debbie Knick what steps she could take. To my recollection she was taken to the Sheriff's Department before a magistrate and was going to charge Jerry with assault and battery, but of course it says here that his court date was set for November 12th and he was obviously charged. I don't remember what happened to those charges, after this incident I think I went and looked at the record and stuff but obviously, I don't know if warrants weren't written or what. I don't remember. I think what happened was he talked her out of it, out of charging her.

Q He talked her out?

A He talked her out of it, yes, sir.

Q Now, when you said after this incident occurred, you went up to look to see what happened. Which **P. 7** incident are you talking about?

A Where she was assaulted.

Q In that instance you went to the Courthouse to see what the disposition of it was, is that what you are telling me?

A Yes, sir.

Q Did you report the alleged assault to anyone else in the department?

A Well, it would have automatically gone to the Chief because this report goes to the Chief.

Q Is that standard operating procedure?

A Yes, sir.

Q Would it have gone to the Chief because it was a field report made by a police officer or because it involved a member of the Police Department?

A Because it was just a normal, not a normal but it was a field report that would have automatically gone to the Chief. As far as any additional investigations, I handled it like any assault. I took the report and advised the victim what she could do. Like I say, where it went from that I don't know. I am not even sure if warrants were even obtained. I am assuming that they should have been because I even had a court date, unless that was my court date I already had that I Pg. 8 put on the report, when it comes up this is my court date when I will be available. I don't remember.

Q It has been a long time.

A It really has.

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[At pages 9-65 Cross Examination/ By Mr. Slayton]

BY MR. SLAYTON:

Q Lieutenant Crowder, would you tell us what the chain of command is in the Police Department for the City of Lexington?

A We had the Chief, and then the Lieutenant's position. We have three field sergeants, one sergeant's position that doubles as a sergeant investigator position and then

usually three other positions on three shifts.

Q And how long have you been, well, I think you told me.

A Approximately five years as a lieutenant.

Q A lieutenant five years?

A Yes, sir.

Q Are you in the direct chain of command, and the reason for the question is if a sergeant needs to make a decision with regard to something that one of his patrol officers was involved in, do they go to you?

A To the Chief.

Q To you and the Chief?

A No, sir, not to me.

Q Directly to the Chief?

A Yes, sir.

Q Where do you fit into the chain of command, I am not talking about personally. Where does the lieutenant fit **P. 10** into the scheme of things?

A It is an administrative position and I do scheduling, vehicle maintenance, training school wise, setting up schools and making sure people's in-service doesn't run out. I handle all the maintenance of things on the road and equipment, uniforms and stuff for the officers. And then whatever else the Chief has me do.

Q Now, when the Chief is out of town for whatever reason, are you then in charge?

A Yes, sir.

Q And if the sergeant on duty needs advice and direction, then you are the person they go to?

A Yes, sir.

Q There has been considerable testimony here by others that the relationship between you and Jerry Knick was not good. Is that correct or not?

A Yes, sir.

Q From your perspective?

A Yes, sir.

Q Could you tell us when that bad feeling developed and the reasons for it?

A Probably when I got promoted to sergeant over someone that, over several people that he thought should have gotten sergeant, which one of them was him.

P. 11 Q One of them was him?

A Yes, sir.

Q Had you been at the Police Department when he was employed or was he there first?

A He was there before I was.

Q Had he been there very long?

A Maybe a year or so, not too long, no, sir; probably not a year.

Q Now, there has also been considerable testimony about this trip to the school he went to down in, I believe Charlotte, North Carolina in 1990. Do you know about that?

A Yes, sir.

Q Did you arrange the administrative details for him to go on that trip?

A Probably.

Q Sergeant Miller testified earlier that he originally had wanted to go to that school. Were you aware of that?

A I don't recall but it is a chance that I probably would have known.

Q Now, if an officer is approved, if an officer comes in and he has a brochure describing a school or whatever, does he submit it to you first or the Chief?

P. 12 A Both; they come to me sometimes and request that they would like to go to a school, specialized training, and then usually I will approve it through the Chief. And then if it is a school that maybe he sees he wants somebody to go to he brings it to me.

Q Once that paperwork is approved by the Chief, what do you do?

A I do the paperwork as far as the travel vouchers and things of that nature and then send them upstairs to be approved.

Q And who approves them upstairs?

A Upstairs, you are not familiar, upstairs being the finance and City Manager's office. The forms are filled out and the travel voucher is filled out by me and calculated as to how much they need for gas and lodging and any fees for the school and things of this nature. We have a form that we have to fill out on that and then at the bottom it is "requested by," and I type my name in there. Then it is approved by the Chief and he signs it and it is sent upstairs to the City Manager and then he approves it. The check is written and cut for the expenses and given directly to the officer.

Q In the case of this particular trip that we have been talking about, is that the procedure that you **P. 13** followed after the trip was approved when Mr. Knick went to North Carolina?

A I would have had to.

Q Do you designate the hotel or motel that the person is staying in?

A Usually the school dictates where the hotel or motel is going to be and then I just make the reservations.

Q When did you become aware of the fact that Lisa Knick had gone down to North Carolina and found her husband at this motel with another woman, Debbie Potter?

A On a Friday night when Sergeant Straub came to my residence.

Q When had he left Lexington to go to this school?

A Probably Tuesday night, probably Tuesday evening, I think.

Q And Sergeant Straub?

A Because it actually started on Wednesday.

Q Go ahead and refer to your notes.

A Yes, he would have gone on January the 9th, on a Tuesday night.

Q What are those records that you are referring to?

A Our weekly duty roster for the schedule. This P. 14 covers from January of 1990 through April of 1991.

Q So he left on Tuesday night?

A Yes, sir.

Q And returned on?

A Should have returned on Friday evening.

Q And is that when Sergeant Straub came to your residence?

A He came to my residence on Friday night.

Q Why was he there?

A To advise me that Jerry had gotten caught with another woman at the school and advised me further that Lisa had came by and given him Jerry's gun.

Q This was highly unusual and out of the ordinary that he had Jerry's gun, wasn't it?

A Yes, sir.

Q Did you regard this as a serious breach of policy?

A Breach of policy?

Q Yes, sir, that somebody else had brought the officer's gun to the Police Department?

A No, sir.

Q Did he tell you why Lisa had brought the gun by there?

A Well, he told me that Lisa was scared that P. 15 Jerry would try to kill himself with it.

Q That didn't alarm you?

A After he told me the circumstances, I just took it as Sergeant Straub and Lisa taking it as a precautionary measure. He advised me what he was going to do with it and then that is how it transpired. He advised me that Jerry was due to come back out to work on Sunday daylight and Sergeant Miller, he was going to turn the gun over to the Sergeant. Sergeant Miller was going to give the gun to Jerry on Sunday morning at 8:00 when he came to work, kind of as

a cooling off period due to the incident.

Q Did you think he might kill himself?

A No, sir.

Q Had he threatened to do that before?

A Not to my knowledge.

Q This is the first time that you heard that he might?

A Yes, sir.

Q Although you never heard him make that threat before, it didn't alarm you?

A No, sir.

Q There must have been something in his makeup or personality that didn't cause you to become alarmed.

P. 16 A That did not?

Q When you got the message.

A Did not become alarmed?

Q Yes, sir.

A It didn't alarm me that Jerry would hurt himself, I didn't take him as a type that would kill himself.

Q Had you ever had this threat from other police officers before or since that they didn't, they were going to kill themselves?

A No, sir.

Q Have you ever had some person outside the Police Department turn in a gun because they were afraid an officer would kill himself?

A No, sir.

Q Did you report this incident to the Chief when he returned to town?

A I don't think the Chief was out of town. He may have been out of town but I don't think he was. Sergeant Straub told me he was bringing me, not bringing me the gun but telling me the information because he didn't want to bother the Chief with it because his words were, "You know how the Chief gets when things get like this."

Q What did he mean?

A He meant that the Chief may blow it out of

P. 17 proportion. I think it was the intention of Sergeant Straub to keep a low profile on it, take Jerry's gun, make it safe and make sure he didn't kill himself. He didn't seem concerned about it. In fact, Sergeant Straub was laughing about that Jerry had gotten caught and even made the comment that he was surprised it hadn't happened before then.

Q Were you surprised he had gotten caught?

A No, sir.

Q Had he been caught before?

A Not to my knowledge.

Q If he hadn't been caught before, why are you saying it didn't surprise you he got caught this time?

A I knew eventually he would get caught.

Q What information did you have that caused you to come to that conclusion?

A Because Jerry bragged about girlfriends and things like this. He openly bragged about that he was seeing this Debbie Potter.

Q Did you know she was going to go with him when you authorized the trip?

A When I authorized the trip?

Q Yes, sir.

A No, sir.

P. 18 Q Did you know she was going with him before he left?

A Yes, sir. I heard rumors that she was going to meet him down there.

Q Did she go down with him or meet him?

A I have no idea.

Q Did they stay in the same motel room, as far as you know?

A I don't know.

Q Did you ever ask him about it?

A No, sir.

Q Did you question him about whether or not city money was being spent to finance this trip for the two of

them?

A No, sir, because the money being spent, he did exactly what he was supposed to, gone down there and gone to school for eight hours. He attended a three-day school, he was in the schools and just basically like anybody else, what he did after hours, after 5:00 after he got out of the school, I feel is pretty much his business, not unless it is against the law or something.

Q You don't regard adultery as being a criminal offense?

A In my jurisdiction, yes, sir, but it wasn't my

P. 19 jurisdiction.

Q In a sense the city financed him to take a woman across the state lines for immoral purposes, didn't it?

A For what he paid of her expenses I don't know.

Q Did you ever ask?

A No, sir. The money he is designated for only allows him to be able to eat and the money for the room and the money for the school.

Q And traveling?

A And traveling.

Q Did you discuss this situation with the Chief?

A The best of my recollection is that I told the Chief about this on the following morning.

Q And Sergeant Straub said he wanted to bring the matter to your attention because the Chief would blow it out of proportion?

A On January 12th, 1990 Wayne Straub came to my residence on Ross Road.

Q Go ahead.

MR. FOLTZ: Excuse me, I think the Record should reflect that you are reading from a statement.

THE WITNESS: That is fine.

MR. SLAYTON: Then we are entitled to get a copy of it. Why don't you look at it and we will P. 20 tell you right now that we

would like a copy. Randy, I don't have any problem with him reading.

MR. FOLTZ: Do you need to redact it? Off the Record.

(Discussion off the Record.)

BY MR. SLAYTON:

Q Lieutenant Crowder, Sergeant Straub testified earlier that he had gone to, well, when the gun was turned over to him by Lisa, and he called in the other two officers who were on duty that night and told them about the event, i.e. her bringing the gun to the Police Department because she was afraid that Jerry might kill himself when he got back to town, he said he briefed them on the situation so that if the department got a call to go around there, they would know what they were dealing with. During that conversation one of the officers told him that he had no choice, he had to report it to cover his ass. Then he said he tried to contact the Chief and the Chief was out of town, that he called your house and you were taking one of your children to Covington or gone over there to pick them up. When you got back to town, you called the P. 21 dispatcher and he went over to your house and that you all sat out in his car and talked. He testified that you told him to give the gun to Sergeant Miller, that to tell Miller to be sure that everything was all right before you gave the gun back to him. Do you recall any of that?

A You are exactly right up to the, I had forgotten I had gone to Clifton to take my little boy back home. You are exactly right up to that point. I don't recall me telling him to give it to Sergeant Miller to make sure he was okay. I may have but I think it was him that initiated what was going to happen and then I said okay. I may have said, "Make sure he is okay."

Q Had you had instances in dealing with Jerry Knick before when he had flown hot and you weren't sure he was all right or you had to calm him down or reprimand or do anything to bring him back into what you would regard appropriate behavior as a police officer?

A Nothing that sticks in my mind, no, sir. Nothing that would draw my attention to it this long off, no, sir. I didn't supervise Jerry that much. Very little did I supervise Jerry.

Q The complaints, if any, that his supervisor might have filed against him P. 22 would have gone up to the Chief. Would the Chief have discussed those with you before making a final decision or not?

A Not if I didn't investigate the complaint, no, sir. Maybe in the day-to-day conversation possibly. It would have gotten back to me. It is a small department, it is not like we have three or four floors and two hundred people where something is going on upstairs and the downstairs doesn't know a thing about it.

Q What was Jerry Knick's reputation in Lexington and around the Police Department with regard to women?

A That he was a womanizer I reckon is the word you used.

Q Did you know his affairs with women other than Deborah Potter?

A — Just by rumor, I never saw a thing. I never indulged any in some of the activity that took place.

Q Was it your job to enforce policy?

A To a certain extent, yes, sir.

Q Now, were you aware of the time in which Sergeant Miller left his weapon at the police station and went home, simply forgot it and left it down there?

A I don't recall it.

Q You don't remember giving him a written reprimand?

P. 23 A I did?

Q That is what you said.

A No, I probably did but, I mean, I may have but I don't remember.

Q Do you remember any disciplinary action being taken against Jerry Knick as a result of this episode down in

North Carolina when he got caught with this woman down there while attending school?

A None other than the fact that the Chief advised me he had talked to Jerry and Jerry had admitted to him that he had a problem and was going to get marriage counseling.

Q Jerry was down there on a pay status, wasn't he?

A Yes, sir, eight hours a day.

Q And the city was paying the hotel room or motel, whatever it was, and the tuition, travel and meals?

A That is correct.

Q Do you know how Lisa Knick was able to determine where he was down there and which motel or hotel to go to so that she could catch him?

A Through my wife.

Q Through your wife?

A Yes, sir.

P. 24 Q Was your wife a friend of hers?

A No, sir.

Q How well did your wife at that time know her based on your personal knowledge?

A None other than to speak to her.

Q Why would your wife, well, how would your wife know what motel Jerry Knick was staying at?

A Because I told her.

Q Did she ask you or you volunteer it?

A I volunteered the information.

Q Tell me why you did that.

A Just out of general conversation. When I went home after I found out that Jerry was going to go down there and meet somebody, I talked about it as somebody to blow off to. Unfortunately for her, she has been listening to it for years. But anyway, I just went home and told her that in reference to Jerry was supposed to meet a girl down there. I told her who it was and I just said that what a shame, I think I probably admitted, it is a shame he is going to a school down there and meeting somebody like that and got his wife sitting

at home. He has got children, I have got children. I just relayed it to her with no intentions whatsoever, none whatsoever, just in general conversation.

P. 25 Q But you are the second in command in the department.

A Exactly.

Q And you could have stopped it at any moment that you chose to.

A Stopped what?

Q His going down there with this woman because you had authorized the city to pay for it.

A Not just off of rumor. I had no firsthand knowledge that he was going to do it, other than the fact that it was rumored within the department.

Q You wouldn't have told your wife if you hadn't been certain.

A Certain as far as me, but certain as far as legality wise and --

Q Forget that.

A Well, there is a difference.

Q No, there isn't a difference in the administration of the Police Department. You have --

A Not if he is going to attend the school and not if he is going to be there in the daytime, during the eight hours that he is supposed to be there. Other than that, it is my opinion and still my opinion that what a police officer does after five o'clock is P. 26 his business. If he is having an affair or doing anything again that is not against the law is not any of my business. I could be wrong.

Q That is not the department policy. It says with regard to the morality of the people who work for the Lexington Police Department.

A I don't know what it says.

Q I understood that you were one of your responsibilities was promulgating policy.

A I am retyping the procedure manual on computer, I am transferring it out of the book into the computer.

Q And you knew what was in the book at the time this was happening.

A I don't right now what it would say as far as it would say as far as someone having an affair, no, sir, I don't.

Q Did you report this to the Chief?

A Did I report what to the Chief?

Q This thing that you had heard about Jerry going down there to attend a school and meeting a woman or taking a woman.

A Not to my knowledge.

Q What did you expect your wife to do about all

P. 27 of this?

A Not a thing.

Q What did she do?

A She left the house and went to a phone and called Lisa and advised her what was going on.

Q Where did she get the motel address to give Lisa?

A She just mentioned Holiday Inn in North Carolina or whatever it was at the time.

Q Lisa called Phil Joines' home around midnight and she knew exactly where she was going to go because she was going to get there at five o'clock in the morning. And I think you will agree that Charlotte is a large metropolitan area, so she had to have an address.

A She may have had an address, it is the Charlotte, North Carolina Holiday Inn or whatever. I am not even sure it is a Holiday Inn now to the best of my recollection.

Q We don't care about the exact address.

A I am telling you how she found out where Lisa was. She called information to find out where, what the phone number was is my understanding that Lisa had to.

Q Did your wife give her the address of the motel?

P. 28 A I don't know, I wasn't there when my wife made the call. I haven't heard anything other than what my wife has

told me.

Q Have you heard the tape that Lisa made?

A No, sir.

Q Are you aware of the fact that Sergeant Straub had heard the tape played in the police station by Lisa to him before he went to see you that night?

A Say that again?

Q Are you now aware that Lisa had played this tape to Sergeant Straub?

A Am I now aware?

Q Yes, sir.

A Yes, sir.

Q I know you weren't aware of that when he went over to see you.

A Right.

Q But you are now aware. Have you ever heard the tape?

A No, sir.

Q How do you know its your wife's voice?

A I don't.

Q Did your wife tell you she made the call?

A Yes.

P. 29 Q Have you been told by other officers in the Police Department that they have heard the tape and that it is your wife's voice?

A No, sir, nobody has ever mentioned the tape to me other than the Chief.

Q And what did the Chief want to know about the tape?

A He didn't want to know anything. He just told me that there was an accusation made that the voice that called Lisa had been identified as my wife and a couple of people in the department had identified her as the caller.

Q Did he ask you why your wife would make the call?

A I don't remember.

Q Well, this was a rather disruptive incident that occurred within the administration of that department, wasn't it?

A Which part of it?

Q Well, you were the number two man in the department.

A All right, sir.

Q You approved the school.

A Okay.

Q And the financing of the school and authorized
P. 30 the officer to attend the school. And then you go home and for whatever reason decide to tell your wife all about it who then makes this anonymous phone call that puts all of this stuff into motion. Lisa goes down there, Lisa catches him, Lisa brings back the gun. None of that would have happened without that phone call from your wife, would it?

A Probably not. I don't know if it would or not.

Q Did the Chief ever discuss this with you?

A Did he discuss it with me?

Q That yes, that your wife had gotten involved in the middle of this situation. Did he ever say, "Why is she doing this"?

A I don't recall that we talked about it.

Q As a result of these charges?

A He was upset because the call was made.

Q The Chief?

A Yes, sir.

Q And did he reprimand you?

A Why reprimand me?

Q I am asking you, I don't know.

A No, I didn't do anything.

Q This never would have happened if you hadn't
P. 31 told your wife.

A That Jerry Knick was going to school and having an affair with another woman?

Q Yes, sir.

A Or I assumed that, probably not. It was not like I told John Doe citizen. I tell my wife. I tell my wife lots of things I wouldn't tell anybody else. That is the only person that a police officer can use to unload things that happened to him in the days period. I try to keep that a minimum so she won't have to listen to it.

Q How long have you been married to your wife?

A Five years.

Q And I am sure that during that time you told her a lot of things that go on in the Police Department.

A Sure, very little, though. I talk less to her about the department than probably the average police officer talks to his wife about it.

Q Has she ever on any other occasion related this information to anybody else?

A I don't know.

Q What motivated your wife to do this, do you know, has she ever told you?

A Probably I speculate, I speculated two things.
P. 32 Probably the fact that she has got a three-year-old son and sitting home with him she can visualize what Lisa was going through. Number two, she knows how many problems that Jerry Knick has caused me over the years.

Q Did she know at the time that Jerry Knick was also having an affair with Cecilia, the nurse at the hospital?

A It could be because she works at the hospital also.

Q That is why I asked you the question.

A I don't know, you will have to ask her that, I don't know.

Q Did she mention that to you?

A At some point I knew Jerry was having an affair with Cecilia but I don't know what point.

Q Did your wife tell you?

A I don't remember.

Q This decision on her part to make this phone call

wasn't a culmination of a lot of affairs, entanglements he had with women other than Debbie Potter, was it?

A I don't understand.

Q Well, how did your wife react when you told her about Jerry going down there and meeting this woman?

A Typical mother's reaction of it is a shame P. 33 Lisa sitting home with two kids and Jerry gone having an affair.

Q Now, Jerry came back to work on Friday. When did this threatened suicide episode at his house occur?

A What incident?

Q The one which resulted in the --

A The phone call?

Q No, the Police Department being called over there and two officers reporting.

A I did not know about this until after Jerry had shot his wife.

Q You didn't know?

A Not even by rumor did I not know.

Q You don't know about it?

A No, sir, that is the God's truth.

Q Now, do you remember when B. J. Bowser was employed by the department?

A No, sir.

Q You weren't there then?

A Yes, I was there but I don't remember what date it was.

Q Well, do you remember that towards the end of her employment with the hospital she was put on administration leave?

P. 34 A From the hospital or Police Department?

Q Police Department.

A From the Police Department, she was put on administrative leave for what? I probably will have you refresh my memory.

Q Have you got those records?

A Where she was put on administrative leave?

Q Yes, sir.

A I didn't put her on administrative leave so I don't have those records.

Q Do you know she was in the hospital for a while before she left the Police Department?

A In a medical hospital?

Q Yes, sir.

A I don't recall right now but I am sure I knew about it.

Q You don't have those records?

A Tell me the dates, I may be able to show you on the schedule.

MR. CARGILL: It was August 9, she was released from the hospital on August 13 of 1990, I believe.

THE WITNESS: I am showing sick leave on her schedule on August the 1st, 2nd, 3rd, 4th, 5th, 6th, P. 35 7th, regular off days on the 8th and 9th. And then I have the schedule scratched through with no indication of what her status was on the 10th, 11th and 12th.

BY MR. SLAYTON:

Q Let me just ask you before you get too far away from those days, was she on a pay status?

A I don't have any idea, I don't take care of that.

Q When you put somebody on administrative leave - -

A I do the schedule to show in black and white where the person is. I have leave, I have leave on the 13th, off on the 14th, leave on the 15th, 16th, 17th, and 18th. What leave that was I do not know. That was something that would have been worked out between the Chief, secretary and probably the city planner. I have no idea what that was.

Q Now, do you remember showing Sergeant Straub some pictures of an individual that had had a stun gun used

against him?

A Do I remember showing him pictures?

Q Yes, do you remember an incident involving a stun gun.

P. 36 A Yes, sir.

Q Tell us what you remember about that.

A I remember somebody having marks on them as a result of Jerry using a stun gun on them. I do remember seeing the pictures. I am not saying I didn't show them to him but I don't remember. I think the pictures were maybe just shown to somebody, me, maybe the investigating officer. I may have investigated, it, I don't know.

Q Did you file a report on that incident?

A Not to my knowledge.

Q Did you make any, did you file any written report on this situation involving Jerry Knick down at North Carolina?

A No, sir.

Q If we wanted to get a copy of those vouchers and invoices issued by the city, would they be available in the Police Department or would they have to come from the City Manager's office?

A They would have to come from bookkeeping.

Q In what department?

A In the City Administration office, out of the City Manager's office.

Q I have here a typed four-page double-spaced

P. 37 document to Chief Beard from you dated April 1, 1991, and it deals principally with the circumstances that followed after the death of, after the shooting of Lisa Knick. When did you file this, do you recall?

A It is dated April 1, 1991?

Q Right. Did you file this with Chief Beard at that time?

A It was his request that I give him a statement as to what I knew about the incident.

Q And Sergeant Bucky Miller was quite upset when

you talked to him, when you arrived there, I believe, wasn't he? Did you talk to Sergeant Miller when you got there? When did you talk to him?

A I don't remember.

Q You didn't make any field notes of why you talked to him or where you talked to him?

A I didn't investigate the incident. It was turned over to the state police almost within an hour after I got there and I had no reason.

Q Where did you get this information?

A Well, this is information that I am relaying as far as how I got to the scene and when I got to scene. I secured the residence by placing Officer Burgdorf at the building, at the house, not to let anybody in, and then with P. 38 permission of Chief Beard I took Jerry to the hospital to keep up with Lisa's status.

Q You told him to change clothes before you took him to the hospital.

A Yes, sir.

Q He was in uniform when he shot his wife, wasn't he?

A That is correct.

Q And he was on duty?

A Yes, sir.

Q And you did learn that there had been an argument between Jerry and the Sergeant, didn't you?

A Yes, sir.

Q And what did you learn the argument was about?

A When Jerry told me at the house or at the hospital, it would have been that same night.

Q When did you first learn of this tape that Lisa made of your wife's call to her?

A When did I learn about the tape?

Q Yes, sir.

A Probably during trial.

Q And tell me how that surfaced.

A I don't know.
Q Were you at the trial?
P. 39 A No, sir.
Q Who told you about the tape?
A I don't know.
Q Do you know where the tape is?
A No, sir.
Q Did you talk to your wife about the tape?
A At some point in time, yes, sir.
Q Did the state police interview her?
A Not to my knowledge, no, sir, they did not.
Q Did the Chief interview your wife about this call?
A No, sir.
Q And how closely did you work with Officer Knick before this incident occurred?
A Like I said before, very little.
Q From your observation of him, what kind of an officer was he?
A He was a good officer.
Q What do you mean he was a good officer?
A Productivity wise he was a good police officer, he was a good traffic officer. He didn't abuse his sick leave, you could depend on him to come to work.
Q Were any complaints filed against him for excessive force?
P. 40 A I think there were.
Q Do you recall any of the details of those complaints of what happened or how they were handled?
A No, sir.
Q After you had this document typed, did you file it with the Chief?
A I typed it myself.
Q Sir?
A I typed it myself, yes, sir, I did.
Q Did you then personally deliver it to him?
A I don't remember if I actually handed it to him but

I am sure I did because he requested it. He at one point in time ordered all the parties to submit to him a statement as to what they knew about the incident.

Q Was a file made of this incident by the Chief, to your knowledge?

A Of the shooting incident?

Q Yes.

A Oh, I am sure it was.

Q What about the incident which resulted in Lisa turning the service weapon in to the Sergeant?

A Was there one made?

Q Yes.

A I don't know.

P. 41 MR. SLAYTON: Off the Record.

(Discussion off the Record.)

BY MR. SLAYTON:

Q In making this report of April the 1st of 1990, did you interview Sergeant Sutton?

A April 1, 1990, which report are you referring to?

Q The one we have been --

A 1991?

Q I am sorry, 1991. Why is this thing done in 1991 when the shooting took place in 1990?

A Because I didn't investigate the killing.

Q What is the purpose of this?

A Because I thought I was going to have to testify in Court.

Q What do you know of any of this firsthand?

A What do I know of any of this firsthand?

Q Except the last paragraph.

A Well, it is mostly fact, it is nothing, if you would read it, I am telling you upon my arrival at Jerry's house, him and Officer Chuck Burgdorf were standing in the front yard. I am not relating anything that didn't happen to P. 42 me, pertaining to me.

Q I understand that but why did you wait a year to

do it?

A Because I actually wasn't involved in the investigation of the case. Once I got to the house and I took Jerry Knick to the hospital, I was instructed to seal off the house and wait until the state police got there and not do anything.

Q I understand this.

A I had nothing to do with any investigation of the incident.

Q But you typed this yourself to prepare yourself to testify in Court.

A Yes, sir.

Q In which trial?

A In the murder trial.

Q What about this pending trial that we are involved in here today?

A The one today?

Q Yes, the one that you are giving the deposition in today.

A The suit hadn't been filled at this time.

Q What other documentation have you prepared?

A None.

P. 43 Q What is the documentation that you have in your folder over there that I asked Mr. Cargill to consider copying and furnishing to us as you have this one?

A Accusations that were made against me in these depositions.

Q By whom?

A Several of the past, several of the present officers.

Q What were you accused of doing or failing to do?

A I have been accused of drug use and relating to people with drugs. I think that was brought up in the depositions.

Q And what do you have over there that relates to those accusations?

A A polygraph stating that they were mere rumors

and acts of jealousy because I had gotten promoted over other people in the department. The same stuff I have been putting up with up until today.

Q Were those the polygraph results of the test that you took or the tests administered to other people in the department?

A Tests that I took personally.

Q Within what period of time has that been?

P. 44 A Do you want a copy of it?

Q I haven't seen it, I don't know whether I do or not.

A They were accusations made and I am just going by mere rumor that that was brought up here again as it has in the past that I had had dealings with drugs and I had used drugs. It came to the point that I had to take a polygraph to proof they were rumors and lies. I did it and I passed the polygraph.

Q Who required you to do that?

A I had three.

Q Who required you to take the first one?

A The Chief of Police at that time.

Q Who required you to take the second one?

A The City Manager.

Q And the third one?

A This Chief.

Q Let me see the one that Chief Beard required you to take.

MR. FOLTZ: For the Record, I would like to have admitted into evidence for this deposition, I think it is Crowder Number Two, memorandum dated April 1, 1991 from Lt. Crowder to Chief Beard P. 45 consisting of four unnumbered pages.

(The above-mentioned document was marked as Deposition Exhibit Number Two and entered into the Deposition.)

BY MR. SLAYTON:

Q Could we look at the other two, please?

A Look at what?

Q You referred to three memos that you had that alleged that you were either associated with drug dealers or --

A No, I don't have copies of these, this is just the final one. I can explain to you if you would like.

Q All right.

A The first polygraph that I took was taken in Roanoke at the state police office. At that particular time they were using a different machine, as I understand, it was a three pin machine. Now I understand they have four pin machines, but anyway, before I became a police officer in 1975 in Clifton Forge, I had used marijuana on probably five occasions. When the accusations started being made that I was using drugs and things, I knew where it was coming from, **P. 46** it was because I had gotten promoted over these other people. I was instructed to take a polygraph in Roanoke and I did so. The key question that they asked me down there was have you ever since you became a police officer used marijuana. I said no. My self-conscious keyed on the "have you ever" and it showed an inconclusive test.

Q That is why the language in that says "recent past," did you note the language?

A Well, recent past, they just, in this polygraph it goes back since I have been on the Lexington Police Department.

Q I understand. Does the distinction that we are both making, you said you had used it, the question --

A Since 1975, and I volunteered them to do it since I became a police officer.

Q I understand, that is the point I am trying to make with you. You told us yes, you had used it four or five times but not since becoming a police officer in Covington?

A Clifton Forge, that is correct.

Q You said that your answer to that question was true, you had not used it since becoming a police officer?

A That is correct.

Q That is your explanation?

A That's right.

P. 47 Q I understand it.

A Then since that was inconclusive I was ordered by the City Manager to take a second test, I mean the Chief of Police to take a second test. The Chief of Police then, Mr. Sutton, arranged for me to take a second polygraph in Virginia Beach under a captain that he knew down there and worked with and had a good reputation at polygraph. I took that polygraph down there and passed it. Then the rumor started playing I was the Chief's pet and he sent me to somebody he knew so I would pass the polygraph. Those rumors went away for awhile and then after I was promoted I think I took it, no, I was still sergeant when I took it. The rumors were still flying around and things. That is what that prompted this memory right here, which I will give to you, the second polygraph was fixed because the then chief worked in Virginia Beach for this guy. So the Chief started hearing the same thing, I was using drugs, I was using drugs, so him and the City Manager sent me to a third polygraph operator in Danville. I took it there and I passed that one.

Q Could we look it those? Are those papers you have with you, do all of them relate to these polygraphs and P. 48 allegations of illegal drug use or are they other documents?

A No, sir, they are other documents.

Q What do they relate to?

A An incident where I was accused of giving a 17-year-old girl alcohol.

Q We heard about that.

A At the bottom of the page it is, Chief Sutton states that he interviewed the person I was supposed to have given the alcohol to and she denies drinking beer at Sergeant Crowder's home and stated that she was drinking a soda.

Q At that time I believe you were divorced.

A I was divorced and I was dating the girl and she was 17, but she was emancipated. She had been divorced herself and had a child. I dated her for approximately three

months.

Q The reason I asked you these questions about these papers --

A I offered them, I didn't try to hide them.

Q That is why I asked you the question. You brought them and I thought you brought them for a purpose.

A I think that is a pretty good purpose. These are the papers where I was promoted to lieutenant. This was the test and the scoring of where I was promoted to lieutenant. There is the computer thing that showed where we **P. 49** were ranked as far as myself, Sergeant Pedersen, Sergeant Straub for the lieutenant's position. That was the results of this.

Q Does that include --

A This shows that I came out on top by not just somebody's choice, but I beat them out honestly for the position.

Q Does that include the psychological?

A No, sir, wait a minute. It might, I don't know. It probably is. It has got things in here, likelihood of maintaining organizational competency and integrity. I am sure the City Manager then took some of that out, corruption, due process, it has got there how you rank, what would be the likelihood you would indulge in these different things.

Q Do we have a copy of that?

A You can have it.

Q Is this a copy?

A You better make a copy of that.

Q What else did you bring?

A Oh, nothing really relevant. This is a copy of the memo where the Critical Incident Debriefing Team will meet at the Lexington Presbyterian Church. This is the same team that was available during the Jerry Hines incident and **P. 50** proved to be very beneficial to those attending. You may invite or bring anyone you wish.

Q Who told you to issue that memo?

A I don't know.

Q Did you attend?

A Yes, sir.

Q Did the Chief attend?

A No, sir.

Q Do you know why?

A No, sir.

Q Do you know why Cecilia Grubb was there?

A No, sir. I reckon because she needed to be debriefed.

Q She is not a part of the Police Department, is she?

A No, sir. It says "or anyone," I reckon she was invited because I put there they could invite people they wanted to. Maybe rescue squad people, I think Cecilia was working the night they brought Lisa. Medical personnel was invited like police personnel. That is general procedure, the debriefing team, they invite anybody. Of course, Jerry wasn't there.

Q Was he invited?

A I doubt it.

[At page 51/ Cross Examination/ By Mr. Slayton]

Q Do you know whether or not he asked Cecilia to attend?

A I don't know.

Q Do you know anything about the confrontation that they had at the hospital with Cecilia and some of the police officers after the debriefing?

A No, sir. I did learn later after the trial about it but not until then. I had no knowledge of it until after the trial.

Q How did you learn after it after the trial?

A Just officers talking, I assume.

Q And you, you are telling us that you are not familiar with the policy with regard to the moral standards that are expected of the police officers in your department?

A I am sure there is one on moral standards. I don't know what it says word for word. You know, there was an

officer within the department, forget that I said that.

Q What were you going to say?

A Nothing.

Q Well --

A It is irrelevant to the case, it is irrelevant to this totally.

Q Was this officer in your department in Lexington?

[At page 52/ Cross Examination /By Mr. Slayton]

A Yes, sir.

Q Well, I am not sure it is irrelevant if it involves a violation of your published policy.

A It involved a violation of policy that the Chief tried to enforce and he tried to enforce disciplinary action that was overturned on him by I assume, I reckon you would say lawyers and the city government.

Q Is that the firing of Officer Smith?

A Officer Smith, yes, sir.

Q For fighting over in Buena Vista?

A Yes, sir.

Q And the Chief terminated him?

A Yes, sir.

Q And that was resolved in the City Manager's office?

A If you want to call it resolved, yes, sir.

Q And then you have the incident in which Officer or Sergeant Williams, Miller, fails to take his gun home from the Police Department and you write him up, according to what he told us, given a written reprimand. Then we have got this thing with Officer Knick and there is no disciplinary action taken.

A That is two totally different things. I am assuming that if Bucky left his gun at the department he left

[At page 53/ Cross Examination/ By Mr. Slayton]

it somewhere where it could have been unsafe. This gun was given to us to make it safe. I don't think you are comparing

apples with oranges.

Q You think it is all right for an officer to take his official police weapon out of the state and then allow it to get away from him?

A I don't know how Lisa got it.

Q Well, that is why --

A I was under the impression that she got it at the house up to this point. If you are telling me otherwise it is news to me.

Q Sergeant Straub didn't tell you that when he told you how he got the gun?

A No, sir, he said Lisa got it. I don't know how Lisa got it.

Q You don't know about Lisa going to North Carolina?

A I know about Lisa going to North Carolina, but I don't know how she got the gun. I don't know if she came back home and took the gun out of the house and gave it to Sergeant Straub. I don't know.

Q Sergeant Straub didn't tell you anything about the circumstances under which Lisa brought that gun into the office?

[At page 54/ Cross Examination/ By Mr. Slayton]

A Under the circumstances that she was scared Jerry was going to kill himself.

Q You knew that she had been to North Carolina didn't you?

A I have told you three times, yes, I know. I certainly know that she went to North Carolina. I am telling you that I don't know at what point Lisa took the gun and I don't know at what point she was getting scared that Jerry would get the gun, whether she took it out of the room scared he would kill himself in North Carolina or whether she took it out of the house scared that he would come home and get it and then kill himself. At this point I don't know where she got the gun from, that is the truth.

Q But the fact that she got the gun and the fact that you knew that she told somebody that she was afraid he would kill himself with the gun, it is like comparing apples and oranges, and you didn't think that in Knick's case it deserved any reprimand of any kind?

A There was a cooling down period from Friday until, from whenever he got caught until Sunday morning when he came to work.

Q And the fact that the gun got away from him is okay?

A The fact that the gun got away from him?

Q Yes, sir, that is okay, is that what you are telling us?

A Yes, sir, because I was under the impression that the gun was taken out of the house before Jerry got home, not that it was taken, physically taken away from him by Lisa.

*** *** *** *** *** ***

[At page 55/ Cross Examination / By Mr. Slayton]

BY MR. SLAYTON:

Q Lieutenant Crowder, before I get to that, I want to ask you if you know Phil Joines.

A Yes, sir.

Q Did you know him when he was a police officer for the City of Lexington, is that where you first met him?

A No, I knew him before when he lived, his father was a minister at a church in Clifton Forge.

Q Is that where you are originally from?

A Me?

Q Yes.

A Yes, sir.

Q Do you remember talking to Mr. Joines after Lisa was killed?

A Was he not at the hospital?

Q Well, yes, he was at the hospital.

A I think he came to the house that night also.

have had in the past with other people that you have worked with because of these allegations of previous use of drugs, and I don't know exactly what the allegation was about this young girl at the party and that kind of thing.

During the preparation for your appearance in this lawsuit here today, was it ever suggested to you that you should get your own attorney to represent your interests?

A No, sir.

Q Do you regard your interests in the outcome of this litigation to be the same and identical to those of the city and those of the Chief of Police?

A Repeat that?

Q Do you regard --

A Repeat it the same way.

Q Do you regard your interests in this particular suit to be identical to those interests of the City of Lexington and the Chief of Police?

A No, sir.

Q And you do understand that this lawsuit was not against you but against the city and the Chief of Police?

*** *** *** *** *** ***

[At page 62/ Cross Examination/ By Mr. Slayton]

I did that and several of the officers were not satisfied with the schedule. I came in to work and posted the schedule and one of the officers, one or two officers approached me with this dissatisfaction with the schedule.

The things I said to him I didn't retrieve but how I said it I apologized for the profanity. That is the first incidence I have had of that in my recollection. I attribute that to the fact that probably only three weeks ago my wife was lying over in the hospital not knowing whether she was going to live or die. My nerves were bad. I think that is what caused that.

It wasn't anything against the officer, it was a mistake of mine. I apologized for what I did, he counseled me for it.

Q Are you familiar with that policy statement (indicating)?

Q But the fact that she got the gun and the fact that you knew that she told somebody that she was afraid he would kill himself with the gun, it is like comparing apples and oranges, and you didn't think that in Knick's case it deserved any reprimand of any kind?

A There was a cooling down period from Friday until, from whenever he got caught until Sunday morning when he came to work.

Q And the fact that the gun got away from him is okay?

A The fact that the gun got away from him?

Q Yes, sir, that is okay, is that what you are telling us?

A Yes, sir, because I was under the impression that the gun was taken out of the house before Jerry got home, not that it was taken, physically taken away from him by Lisa.

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[At page 55/ Cross Examination / By Mr. Slayton]

BY MR. SLAYTON:

Q Lieutenant Crowder, before I get to that, I want to ask you if you know Phil Joines.

A Yes, sir.

Q Did you know him when he was a police officer for the City of Lexington, is that where you first met him?

A No, I knew him before when he lived, his father was a minister at a church in Clifton Forge.

Q Is that where you are originally from?

A Me?

Q Yes.

A Yes, sir.

Q Do you remember talking to Mr. Joines after Lisa was killed?

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Q Well, yes, he was at the hospital.

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It wasn't anything against the officer, it was a mistake of mine. I apologized for what I did, he counseled me for it.

Q Are you familiar with that policy statement (indicating)?

A Yes.

Q Which I showed you earlier that was introduced previously, it is Miller Number One.

A Yes, sir.

Q What did you have to do, what if anything, did you have to do with the formulation of that policy?

A Nothing.

[At page 63/ Cross Examination/ By Mr. Slayton]

Q Do you know why that policy was adopted?

A For several reasons. I assume it would be for officers that are having marital problems, drinking problems, possibly drug problems, any kind of problems and for them to be able to go to talk to counseling if they needed.

Q And those problems existed within the Lexington Police Department?

A Which problems?

Q Any of those that you have enumerated that you just, the marital problems, the drug problems, the drinking problems, any of those kind of problems, are they there?

A One or more, yes, sir.

Q And was there, to your knowledge, any particular event that resulted in that policy being adopted by the department?

A Well, considering it is only a couple of months after the shooting I would say it was probably the result of that.

Q Now, when a policy is adopted in the Police Department in Lexington, is it the sole decision of the Chief as to what the policy is going to say and what is going to, the words that are going to be in it that set it forth?

A Yes, sir.

Q Is there an input process that those of you P. 64 who work out in the field know what is going on in the street and know what is happening to employees of the department so that you can suggest changes to a policy that is not working or to anyway amend and improve the policy?

A Yes, sir, they can approach the Chief at any time with a policy that they are not in agreement with or think that it needs to be changed. Yes, sir, I think it is the responsibility of the sergeants and anybody within the department that feels that the policy is not adequate for what we need. The Chief is very open-minded with things of that nature.

Q Could that policy be changed tomorrow?

A Absolutely.

Q If it were the desire of the Chief to do so?

A Sure he could.

Q Would he have to get the approval of the City Manager to change it?

A No, sir.

Q Are those policies only applicable to the Police Department of the City of Lexington?

A Yes, sir.

Q Think about this carefully.

A Don't worry.

Q Having read the policy, particularly the last Paragraph Four, in looking back on the behavior of Jerry Knick, would you say in light of that that he was a fit and proper person to be armed and ready for duty? **P. 65**

A I think you shot two questions at me. I was expecting you to say he is a person that would fall under the category of this, is that what you are asking?

Q Not really. I know that the policy wasn't in effect, it didn't exist.

A Right.

Q When he was having his problem.

A You are saying had it been?

Q Had you, I am not saying had it been. What I am saying to you is you see what the policy is now.

A Yes, sir.

Q Just reflect back on the way he was behaving.

A Yes, sir.

Q In light of this, would you think he would be fit

for duty?

A Yes, sir.

MR. SLAYTON: Okay, thank you. I have no further questions.

[At page 66/ Examination by Mr. Cargill, Attorney for Lt. Crowder]

BY MR. CARGILL:

Q Lieutenant Crowder, in your opinion, was Jerry Knick a professionally competent policeman?

A Yes, sir.

Q Did you ever observe firsthand any behavior on Jerry Knick's part that caused you to doubt his fitness to perform his duties as a policeman?

A No, sir.

Q If you had observed anything that caused you to doubt Mr. Knick's fitness to serve as a policeman, would you have done something about it?

A Yes, sir, I would have.

Q Did you ever observe Mr. Knick use his weapon in any way that would cause you to doubt his fitness to carry a weapon?

A No, sir, as a firearms instructor, no, sir.

Q And in any of your dealings with Mr. Knick, did you ever see him handle a weapon that would cause you to doubt his fitness to carry a weapon as a policeman?

A No, sir, if it was he wouldn't have been allowed to be a firearms instructor himself.

Q You indicated to Mr. Slayton in response to a

[At Page 67/ Examination/ By Mr. Cargill]

couple of his questions that to compare the incident where Mr. Miller, Sergeant Miller's weapon was found with the incident where Mr. Knick's weapon was turned into the department was like comparing apples to oranges.

Would you explain to us, please, why you use that analogy?

A Sergeant Miller obviously, and I still don't

remember right now writing that letter but I probably did, obviously left it in a place where a citizen or somebody could have gotten a hold of it to rather hurt themselves or coming in and harming another police officer with it. It certainly wouldn't have been in a position where it was in a personal desk drawer or given to the dispatcher, it must have been laying out. Again, I apologize, I don't remember it.

Q If it is true that Sergeant Miller left his weapon unattended and unaccounted for, if that is true, would it be fair to say that he was reprimanded because the weapon was not accounted for?

A That's right, left in an unsafe manner.

Q In the case of Mr. Knick's weapon, would it be fair to say that his weapon was accounted for?

A Accounted for plus made safe.

Q And you didn't know where Mrs. Knick got the P. 68 weapon?

A No, sir; somebody would have to tell me at this point where she got it because I do not know.

MR. CARGILL: Thank you.

REDIRECT EXAMINATION

BY MR. SLAYTON:

Q I believe you said you don't know the details of how the Knick weapon showed up at the Police Department, your knowledge is limited to the fact that Sergeant Straub had it in his possession when he was talking to you.

A Yes, sir.

Q And I believe you further said that you didn't know that she had gotten it when she was down in North Carolina and brought it back to Lexington and then took it to the police station until I told you earlier.

A That is correct.

Q So because you didn't know the background of how this weapon showed up in the police station, it looks like apples and oranges?

A It was apples and oranges even if I had known, it was apples and oranges because the gun was made safe. I don't know how she got it back from him, and she did that in

[At page 69/ Re-Cross / By Mr. Slayton]

North Carolina, I don't know how she got back. I don't know if she got it in North Carolina or got it from the house but how ever, Sergeant Straub got it or how ever she got it and gave it to Sergeant Straub, he brought it to me and both of us came to a mutual agreement on what to do with it.

He agreed to it as much as I did that it was okay to give it to the next sergeant and have him hold it until 8:00 the next Sunday morning for a cooling off period. I suppose if something happened between that time we would be dealing with that. But it didn't.

I felt that that was a good choice that we made. I would have done that on any domestic.

MR. SLAYTON: Okay. Under the Rules of Court you have the right to read your deposition and sign it. You also have the right to waive the reading of it and allow the Court Reporter to sign your name without reading it.

Now, the choice is yours and you just tell her what your preference is and that is what will happen.

THE WITNESS: Are we entitled to a copy of it?

MR. SLAYTON: No, but you are entitled to read it before you sign it.

THE WITNESS: Then she can sign it for me. P. 70 The only request would be I get a copy of it.

(4:50 P.M.) FURTHER THE DEPONENT SAITH

CERTIFICATE

COMMONWEALTH OF VIRGINIA

CITY OF ROANOKE

I, Katherine P. Ford, Notary Public in and for the

Commonwealth of Virginia, at Large, do hereby certify that the deposition of STEVEN E. CROWDER was by me reduced to machine shorthand in the presence of the witness, afterwards transcribed under my direction by means of computer, and that to the best of my ability, the foregoing is a true and correct transcript of the deposition so given by him as aforesaid.

I further certify that this deposition was taken at the time and place in the foregoing caption specified.

I further certify that I am not a relative, counsel or attorney for either party or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand at Roanoke, Virginia, on this the 9th day of May, 1992.

_____

Katherine P. Ford
Notary Public

My Commission expires February 28, 1995.

DEPOSITION OF:

SERGEANT WAYNE STRAUB

May 5, 1992

DEPOSITION OF WAYNE STRAUB
MAY 5, 1992

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Page 3 Mr. Straub {by Mr. Slayton}[direct]

The Deposition of WAYNE STRAUB was taken at the Law Offices of Woods, Rogers & Hazlegrove, Roanoke, Virginia, at 2:30 p.m. on the 5th day of May, 1992, in the presence of Franklin M. SLayton and Thomas J. Foltz, Attorneys for the Plaintiff, and Randy V. Cargill, Attorney for the Defendants.

All formalities as to caption, certificate and Notice of Filing were waived. It was agreed that Mikel J. Copeland, Notary Public in and for the Commonwealth of Virginia, at Large, may take said Deposition in machine shorthand and transcribe the same to typewriting by means of Computer-Aided Transcription.

Said Deposition was taken subject alone to objections that are required by the Federal Rules of Civil Procedure to be made at the time the deposition is taken. All other objections are reserved until the trial.

WAYNE STRAUB

was called as a witness, and after having first been duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

*** *** ***

[page four] {by Mr. Slayton} [direct]

BY MR. SLAYTON:

Q: State your name, please.
A: Wayne Straub.
Q: What is your address, Mr. Straub?
A: Route 4, Box 350, Lexington, Virginia.
Q: What is your educational background?
A: Military high school and two years of college.
Q: How long have you been with the Police

Department in the City of Lexington?

A: Twelve years, starting on 13.

Q: What is your rank?

A: I am a sergeant.

Q: How long have you been a sergeant?

A: I believe since 1983.

Q: Were you the supervisor for Officer Ramos?

A: Yes, sir.

Q: Were you on duty when Lisa Knick brought to the Police Department the service weapon of Jerry Knick?

A: Yes; I was.

Q: Tell us what happened and what you did, the best you can recall.

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[page five]

A: I was working the 4:00-to-12:00 shift and Lisa came into the office around dinnertime and she had a shoe box with Jerry's name printed on the outside of it and it was his automatic pistol.

She said that she needed to talk to me in private. I took her to a back office and she told me about she had just returned a few hours earlier from -- it was either a few hours earlier or the day before, from Charlotte, North Carolina, where she had gone and found Jerry in a motel room with another woman.

She brought me his weapon and gave it to me and stated that she was afraid that when Jerry got home that he would shoot himself.

So I took the weapon and talked with her and later that evening after she left I tried to get ahold of Chief Beard. I could not, for some reason. Whether he was out of town or whatever, I do not know.

I finally got in touch with Lieutenant Crowder and I went to his residence and told him what Lisa had told me and let him make the decision as to what to do.

Q: What was Lisa's demeanor?

A: Well, I know she had been drinking and it was almost like she was in an excited state, talking very fast. Of course, she was upset about the events that had

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[page six]

transpired but she was very concerned that when Jerry came home that they would have a confrontation.

She was wanting him to leave. She told me she was going to have him leave the house or ask him to leave the house and every time that they had some sort of marital problems and she would ask him to leave or whatever, then he would threaten to commit suicide.

Q: Had you known of that tendency on his part before this particular night?

A: No.

Q: Do you remember B. J. Bowser talking about it sometime before this?

A: I know some things that I had heard but I mean as far as anything ever direct as this was, no.

Q: Was Phil Joines there?

A: He came in about the time Lisa and I had finished talking. He and his wife had their two children, to the best of my recollection.

Q: Did you talk to anybody who was with the Police Department about this event after Lisa left?

A: Yes.

Q: Before you got to Lieutenant Crowder?

A: Yes.

Q: Who else did you talk to?

*** *** ***

[page seven]

A: Officer Ramos and Officer Smith.

Q: Why did you talk to them?

A: For the simple reason I called the two of them in in case Jerry got home and there was some problems and she called for help, I didn't want them going into a situation

blind and not knowing what was going on.

Because Jerry was a big boy, a strong boy, and my feeling was if we had to go over there and had to deal with him and if he didn't listen to reason, if he was such as she said or thought he may be, we maybe would have to hurt him.

Q: Were you concerned about her safety?

A: I asked her point-blank when we had our conversation would Jerry ever hurt her and her answer was no.

Q: Did she tell you during that conversation how she found out that Jerry was in Charlotte or someplace in North Carolina with this other woman?

A: Yes.

Q: How did she find out about it?

A: She told me she had received an anonymous telephone call.

Q: Did she tell you she had recorded it?

A: Yes, sir.

Q: Have you ever heard the recording?

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[page eight]

A: I heard the tape. I can't remember if I heard all of it.

Q: Where did you hear it?

A: In the office this night.

Q: When she left did the tape stay with you or did she take it?

A: She took the tape.

Q: Could you identify the voice?

A: The person who I thought it was -- and I don't know, but I am reasonably sure -- it sounded like Lieutenant Crowder's wife.

Q: With that knowledge -- and I know that you just thought it was -- but when you went to the lieutenant's home, was he there?

A: To the best of my recollection, I had the dispatcher to call because I couldn't get in touch with the chief.

Q: So after the dispatcher called the lieutenant's house --

A: I originally tried to get in touch with Jerry's supervisor, following the chain of command.

Q: Who would that have been?

A: Sergeant Sutton.

Q: Tell me, there has been some confusion about

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[page nine]

how this chain of command in the Police Department works.

A: Sergeant Sutton is Jerry's immediate supervisor. So I was going to contact him and he had left town because he was on his four-day break. So I decided to call the chief and couldn't get the chief.

So I had the dispatcher to call to try and get in touch with Lieutenant Crowder. And I was told that he had taken his son back to Covington or Clifton Forge, one of those two, and would be back later.

So I had the dispatcher to tell him that it was urgent, that I needed to speak to him as soon as he came back and would he please let us know.

Q: About what time, approximately, was all this going on?

A: It was before midnight. I would say she came into the office around dinner hour, 6:00 or 6:30 and I probably didn't speak with Lieutenant Crowder until after 9:00.

Q: When you spoke to him, was it face to face, by telephone or how did you handle that?

A: Face to face. I went to his residence and he came out and got in my vehicle and sat with me and I explained to him what had happened.

Q: Did he appear to be surprised that Lisa had

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[page ten]

caught Jerry in North Carolina with Debbie Potter?

A: No; not really, because Jerry had been caught before.

Q: Did you tell the lieutenant about the tape?

A: No, sir.

Q: Did you talk to him later about the tape?

A: No, sir; I just told him she had told me that she had received an anonymous phone call. There was no reason at that point in time, I felt, to tell a man that his wife was responsible for getting another man caught.

Q: Did you ever talk to him about it?

A: No, sir.

Q: You never have discussed this tape with the lieutenant?

A: No, sir.

Q: Have you ever mentioned it to Molly Crowder? Is that his wife?

A: Yes.

Q: Do you know her?

A: Yes.

Q: Do you know who else heard the tape besides you?

A: I was the only one there when she played it – but just through conversation over periods of time, I know

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[page 12]

and I don't think the relationship between either of them was an eye-to-eye type relationship.

Q: You earlier remarked that Jerry had been caught before. What did you mean by that?

A: With another woman.

Q: More than once?

A: I think so, yes.

Q: Did the lieutenant take the weapon?

A: No, sir. I had it in the office in my drawer, locked up. And I asked him what he wanted me to do.

He told me to advise Sergeant Miller, when he came on duty at midnight, to have him to check out Jerry's state of mind or whatever the following morning when Jerry was scheduled to come to work and if he was okay, to give him his gun back.

Q: Did you talk to Sergeant Miller?

A: Yes; I did.

Q: What were you to do to check out his state of mind?

A: I told him what the lieutenant said and I gave him the shoe box with the fun in it and relayed to him the events of the evening.

Q: Was it loaded?

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[page 13]

A: Yes. Well, but the magazine was out of it.

Q: There was a round in the chamber?

A: I don't believe there was. I always check a weapon to make sure and I am sure that there was not but I can't honestly sit here and say that there was or there wasn't.

Q: Did you write this event up?

A: No, sir.

Q: This is an extraordinary thing to happen to a policeman, isn't it, for somebody else to bring his weapon in?

A: Yes, sir.

Q: Had you ever seen Jerry Knick engage in any horseplay with a weapon, practicing quick draw, pulling it out in the police station?

A: A couple times, several times maybe, yes. No ever at anybody.

We would maybe like get a teletype in saying be on the lookout for an armed subject or something of that nature and I have seen Jerry pull his gun out quickly and say "Well, let him come to town," you know, that type of thing.

Q: Did you ever caution him about doing that?

A: No, sir.

Q: To your knowledge did Lieutenant Crowder

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[page 14]

report this incident to the chief?

A: I don't know if he did or not.

Q: When did you next see Jerry?

A: The next Sunday night after this happened.

Q: What day of the week did this happen on?

A: She brought me the gun on a Friday evening and then I guess I would have had to have seen Jerry the next day because he would have been working daylight. I would have had to of seen him in shift change.

Q: Did he mention this to you?

A: Nothing sticks in my mind.

Q: What happened that Sunday night?

A: Then Sunday night I was in the office doing some paperwork and the dispatcher told me that there was a phone call for me and it was Lisa and she told me that Jerry was home crying and throwing a fit and could I come over to the house or apartment.

Q: Did you go?

A: Yes.

Q: What did you find when you got there?

A: Lisa met me at the front door and she was holding a two- or three-page letter that Jerry had written to her.

She told me that he was in the back bedroom

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[page 15]

with the door locked and that he was crying and stating that he was going to kill himself and she said, "I don't know if he will talk to you or not because he is really pissed with you."

Those were her words, because I had gone and told Lieutenant Crowder about Friday evening. And she said, "I

am also pissed with you."

Q: Did she tell you why se felt that way toward you?

A: I guess she came in confidence but under the circumstances, you know, in case something did happen, I felt I had to report it.

Q: But you didn't make a written report of this episode to the lieutenant?

A: I would have if I had been instructed to but I was not, so I did not.

Q: By that you mean instructed to put it in writing by the lieutenant?

A: Yes, sir.

Q: So Jerry came to work the next day, as best you recall, after she turned in the gun to you and after a conference with the lieutenant you gave it to Jerry's sergeant --

A: No, I gave it to Sergeant Miller, who was the

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[page 16]

midnight sergeant.

Q: Okay, and then Sergeant Miller did what with it, do you know?

A: I assume he gave it back to Jerry. I wasn't there.

Q: Did you ever talk to Sergeant Miller to be sure that he covered your tracks and that the lieutenant's message was relayed?

A: I told Sergeant Miller. I probably did. I can't remember. It has been a longtime and there have been a lot of conversations.

Q: When Lisa told you how Jerry felt about you and how she, in turn, felt about you, did the two of you talk?

A: I talked with her. She gave me the letter, and you know, I read the first couple of line of it.

Q: Who had written the letter?

A: Jerry.

Q: What was it about? Was he trying to explain what --

A: Telling her how much he loved her and that type of thing. I didn't want to read it, you know.

Q: Did you give the letter back to her?

A: Yes. I mean, this was outside the house on

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[page 17]

the front steps, you know. So I went back there --

Q: What was her demeanor when she met you at the door?

A: She wasn't crying, you know. She was scared. She was afraid Jerry was going to do something to himself.

Q: By that time he had gotten the gun back, hadn't he?

A: Yes, sir.

Q: Did you see the weapon?

A: No, sir.

Q: Did you look for it?

A: Yes, I did look for it when he opened the door.

Q: When Jerry opened the door?

A: Right. He was in a back bedroom.

Q: How was he clothed?

A: As well as I remember, a T-shirt and underwear, because he was laying in the floor in a fetal position crying.

Q: Did you see the weapon?

A: No, sir, I didn't see a weapon at all. He had paper and a pencil and he was writing her another letter.

Q: Was the door to the bedroom locked?

A: Yes.

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[page 18]

Q: How long did it take you to get him to open

the door?

A: Several minutes. He told me he was mad at me and he didn't want to talk to me. Mark Ramos came and he finally opened the door and let Mark come in. It was at that point that I looked and I didn't see a weapon anywhere.

So there were only two of us working. At that time I got a call for a domestic and I left Ramos with Jerry and went and answered the domestic.

Q: Did you tell Ramos that you would take care of this situation, as he said, that you would do the blue sheet on the call to Jerry?

A: I can't remember. I don't remember saying anything like that. I remember going back and telling the dispatcher what had happened, because we weren't dispatched by radio and it wouldn't have been on a log sheet.

Q: She had brought this weapon into the police station in a shoe box and she had told you that she had been down to Charlotte and caught him with another woman and she told you that the lieutenant's wife had made this phone call and that she was afraid he might kill himself.

And then it looks like it is beginning to develop, so you go over to his house and you find him locked

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[page 19]

in the bedroom in a fetal position. Did you write any of this up?

A: No, sir.

Q: Why wouldn't you do it to cover your own position?

A: Because I didn't believe Jerry, that he would never shoot himself.

Q: You knew him and I never have met him. Tell me why you say that.

A: Because Jerry was a great manipulator of people.

Q: Give us an example.

A: Jerry was a womanizer. And all Jerry was trying to do was to get sympathy from Lisa so she wouldn't kick him out of the house. He knew what buttons to push to get her to react whatever way he wanted her to.

And he knew that by telling her he was going to kill himself that he could get a reaction out of her and the reaction that he wanted.

Q: Police officers under the best of circumstances work in stressful conditions and they are the only people I know in this country that can legally carry guns.

Didn't it both you that you have got this

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[page 24]

promised him faithfully that he was going to clean his act up and that he was going to start counseling with a counselor in Staunton.

Q: When Jerry was in North Carolina in school was he in a duty status?

A: Yes, sir.

Q: Which meant he was being paid?

A: Yes, sir.

Q: Was it a violation of the departmental rules, regulations or policies for him to take this woman with him?

A: Well, he didn't take a department vehicle, so he didn't transport her in a department vehicle. I know the answer to that anyway.

And I believe -- I can't honestly say for sure, but it seems to me like Lisa said that he had rented another room or something for the woman. I don't know. That just kind of sticks in my mind.

That, in itself, wouldn't be using any of the city's money, so other than the conduct clause, unless he actually took this woman in a city police vehicle and used city money to pay for her room and buy her meals, I guess it wouldn't be a violation.

Q: But if he didn't get a separate room -- he was

reimbursed for his lodging and for his food and other
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[page 26]
Did that conduct carry over into the way in which he performed as a police officer?

A: Jerry could be a very good police officer. He knew the job.

Q: Tell us about the other side of it.

A: But he was hot and cold. He would go for times and not do anything and at other times he would go and be exemplary, you know. He could outwork anybody in the department. He was a good conversationalist.

Q: Tell us about this woman at Provident.

A: I don't even know her name. She was some relation to Jimmy Ruley, who was an officer with the department at that time. Jimmy may have been her uncle. And apparently Jerry had a fling with her.

I didn't know it until he and I were going to South Carolina together and he had told me that at one point in time he was spending one week with this woman and then coming back home and spending a week with Lisa, you know.

Q: He was also taking advantage of the shift he was working and the fact he was a police officer to pick her up and escort her to the bank and arrange to meet her through that contact; isn't that correct?

A: I don't know about that but we all get dispatched from time to time to Provident to pick the women
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[page 28]

A: I had heard talk about it later, after the fact, but never any direct knowledge. And it didn't come from Jerry. It seems to me like it came from Lisa and Rick Sutton.

Q: Lisa?

A: Excuse me, B. J. and Rick Sutton.

Q: What was Rick Sutton's position with the department at that time?

A; I don't know. He may have been a sergeant. I don't know. Or he may have been a patrolman. I don't know.

Q: So early on you had heard from B. J. Bowser and Rick about this suicide episode --

A: Possibly them. I am kind of grasping right now.

Q: Anyway, you had heard about it?

A: I had heard it.

Q: Then you knew about the situation at his house when you went there, after the gun business. Was there any in between that you had heard of?

A: No.

Q: Are you sure?

A: Yes.

Q: When you were talking to the chief after you

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[page 29]

had taken the gun back and you had been off several days, did you express any concern to the chief that you had this officer working the streets of Lexington who had been talking about suicide?

A: I didn't really, you know -- I can't say that I did because the conversation that I had with the chief was short. It was after I had worked midnight.

I had made him aware of the events that happened on Friday night and again on Sunday night and I explained to him why there was nothing on the radio log and also why there was no blue complain and the chief told me that he had talked with Jerry about it and that Jerry was promising to mend his ways, you know, and he was going to counseling in Staunton.

So, therefore, I was of the opinion that the chief knew everything, had talked with Jerry, and they had worked it out

and that was it.

Q: And the decision was made before you had an opportunity to tell the chief the circumstances under which Lisa brought the gun to you and the fact that you had listened to this tape --

A: I didn't tell him about the tape. I didn't tell anybody about the tape.

Q: That is what I am driving at, because there

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[page 30]

was a lot of turmoil in the department at that time, there had to be, and people like you had to see it, because you were sort of in the middle.

I mean, you are minding your own business and a police officer's wife walks in and she could have had anything in that box, you wouldn't have know it, and you know, bingo, there is the gun.

A: That is why I went to Lieutenant Crowder.

Q: That is what I am saying, it is all in your lap. So by the time you get to the chief, having been on the hot seat, it was a done deal and you hadn't had any input.

A: I talked with Lieutenant Crowder on Friday evening and I talked with the chief the following Wednesday morning.

Q: Did Lieutenant Crowder ever become engaged in any of this dialogue while you were talking to the chief?

A: No, sir, this was just the chief and myself.

Q: Didn't the existence of this tape concern you?

A: Yes, it did and it didn't.

Q: Didn't you appreciate the fact that with Lisa holding that tape that the lieutenant would be subject to being blackmailed?

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[page 32]

that we have just been talking about here and put it in his

personnel file?

A: I do not know. I would have done it had I been directed to. But I did not.

Q: You have been there for over 12 years, what has to happen, what does an officer have to do before an episode like this is written up and put in his or her file?

A: Well, there are things written up and put in peoples' files all the time, formal complaints that come in from citizens and whatever.

And you know, it is given to different people to investigate and either exonerate them or find some fact to the complaint or find them guilty and you know, that type of thing. This was a situation I had never been in before.

Q: Have you ever been in it since?

A: No, sir, and hope I never am in another one like this. So it was kind of unique.

Q: Forgetting this episode with Jerry Knick, have you ever had a police officer who threatened to commit suicide?

A: No; not to my knowledge.

Q: Have you had it happen since?

A: No, sir.

Q: That is why I am trying to figure out why in

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[page 34]

A: Officer Ramos, Officer Smith and Phillip Joines.

Q: Were you on duty the night Lisa was shot?

A: No, sir.

Q: When had you last worked?

A: Well, I was on the midnight shift so that would have meant that Jerry was on daylight, I would assume. I think that is right.

Or he may have been working 4:00-to-12:00. I guess he was working 4:00-to-12:00. I take that back, it would have been the 4:00-to-12:00 shift.

Q: That he was working?

A: Yes.

Q: And you would have been coming on at midnight?

A: Yes.

Q: When did you first learn of the shooting?

A: When I was in the shower and I didn't learn of the shooting. The wife came and said, "The Police Department called and they need for you to come to work right away."

So then when I got out of the shower I went and called before I left because I figured it was going to be one of those nights of doing something else.

Q: When you left did you go directly to the

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[page 35]

police station or where did you go?

A: I went to the police station.

Q: What did you find when you arrived there?

A: Nothing really. I think everybody was at the hospital, except for the dispatcher.

Q: Who was the supervisor on duty that night?

A: I can't remember. I would guess Rick Sutton. It would have had to have been Rick Sutton, because he was working.

Q: There was a meeting a couple days after the funeral in a church there in Lexington. Did you attend that meeting?

A: A debriefing?

Q: Yes.

A: Yes.

Q: Who was in charge of that?

A: I believe it was a Waynesboro police officer and an Augusta County deputy.

Q: Were all of you required to attend or asked to attend?

A: We weren't required. We were asked to.

Q: By whom?

A: There was a directive, as well as I remember, put out by the chief.

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[page 36]

Q: Did you go?

A: Yes, sir.

Q: Was Cecelia there?

A: Yes, sir.

Q: Prior to Lisa's death did you know that Jerry Knick was having an affair with her?

A: No, sir.

Q: Did you later learn --

A: I learned the night of the shooting.

Q: Tell me how you learned that.

A: Chuck Burgdorf sitting in my patrol car at 4:00 or 5:00 that morning before he went home crying and telling me that he knew about it and he was mad at Jerry for what Jerry had done.

He was so emotional he couldn't drive and I sat in the police car and talked to him and put my arms around him and held him probably for about an hour.

Q: My information is that she is a regular nurse at the hospital there who works in the Emergency Room and I would think she would see a great deal of trauma and that sort of thing.

Is there any particular reason she was at that meeting when you all were there?

A: I was shocked as everybody else when I saw

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[page 37]

her come in. I didn't feel she should have been there.

Q: There had to be some reason for you to react that way. Why did you feel that way?

A: Well, I guess it is only human nature. I felt

like she was partly responsible for what had happened to Lisa.

Q: Other witnesses have told us that as part of this therapy that various people got up and made statements about how they felt about what had happened. Is that fair to say?

A: Yes, sir.

Q: Did she speak?

A: I believe she did but I can't remember what she said.

Q: Was Jerry there?

A: No.

Q: After he was arrested he was out on bail pretty shortly, wasn't he?

A: Sometime afterwards, within a day or two.

Q: Having had all these experiences with Jerry and watching the way he behaved in the handling of his firearm and all that sort of thing, have there been any changes in the way the Police Department does business in Lexington, the way it handles officers who exhibit stress or

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[page 38]

anything of that kind?

A: Yes, sir; we do have a policy now regarding counseling and at any time the chief has the reason or the right, if he feels there is a problem with somebody, to send them to counseling, whatever.

Q: How would he know that?

A: By his own observations, by observations or what he is told from other officers or what is told from supervisors.

We are not a 600-man department. We are only 16 people and you know, he doesn't have to go around Robin Hood's barn a lot of times to find out things.

Q: Based on just what you have said it would seem to me it would have been common knowledge within

that 16-man Police Department that Jerry Knick was a loose cannon, just getting ready to hurt himself or somebody.

A: Well, I can't say that Jerry was, you know, a loose cannon, as you say. I think, and I for one, felt that Jerry's problem was the opposite sex, that he was one of these individuals who just no matter come hell or high water or what, he was going to chase the women.

Q: I understand that, but you also had seen him in a situation in which his wife was so much afraid that he might harm himself that she brought his service weapon to

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[page 39]

you.

A: Yes, sir. That was the only time that I had ever seen his like that, that night.

Q: That is the only time you had seen any police officer that way that you worked with on that force for the last 12 and one-half years, isn't it?

A: Yes, sir.

Q: It seems like all the red lights would have come on and somebody would have said, "We got a problem here."

A: Well, it didn't come on in this head. Like I say, I felt that Jerry was a manipulator and he was using this to manipulate Lisa and you know, you don't want to think bad about the people that you work with, and you know, honestly, it never entered my head that he was crazy or anything.

I don't know. Maybe he was crazy, maybe he wasn't.

Q: Did you ever feel like he was manipulating you?

A: Yes, maybe to a degree. I felt like he was manipulating Lisa and that part I didn't like, because she was a really nice person and I like her. And I am pissed at him for the whole thing that happened.

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[page 40]

Q: What about his trying to manipulate the lieutenant?

A: In which way?

Q: In any way?

A: He and the lieutenant didn't get along and that is one area that I didn't get involved with. I knew they didn't get along and they butted heads a whole lot.

Q: What would bring about that confrontation?

A: I think both of them had personalities so much alike they were like two old billy goats, they were just always butting heads.

Q: Do you know of any reason why Molly Crowder would want to inject herself into the situation?

A: No, sir.

Q: From you observations how did Jerry get along with her?

A: I don't know. She worked at the hospital where this Cecelia worked, you know. He knew her, I would assume, about like I knew her; knew her as Molly McCormick when they were dating and Molly Crowder after they got married and would speak to her on the phone if she called and speak to her when she came in the building, but you know, I don't know of any type of relationship that they had.

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[page 41]

Q: Do you know anything about rolling papers or marijuana being found in Lieutenant Crowders car or possession or anything of that kind?

A: Some years ago.

Q: When you say that, give me an approximation.

A: I don't know, 1984, 1985. Larry Sutton was chief.

I had gone to school to Waynesboro and had a Buena Vista officer ride with me and on lunchtime that day when

we got in the car, it was cold and the officer had opened the back door and put his coat in the back and he said "What is this?" And he reached over and under the driver's seat he pulled out a bag of marijuana.

Q: Was that a city --

A: City police car.

Q: Lexington?

A: Yes, sir. When I went back that evening I put the marijuana in Property and Evidence and I told the chief at that time, who was Sutton, you know, who was there when I found it, what the circumstances were and then it was turned over to the property clerk, who at that time was Captain Kirby.

Q: What ever happened to that?

A: I don't know. I often wondered. Some years

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[page 42]

down the line I went back and looked through the records and never found a record of it.

Q: When you say a blue sheet is made up as a result of a domestic problem, how long does the department keep that record?

A: I would assume forever. I mean, unless there is an offense or incident report done, that is the only permanent record that you have.

Q: Do you recall Jerry being reprimanded or censured for kissing some girl in a parking lot in Lexington shortly after he came to the department?

A: He got some time off. And I think that came from Lieutenant Beard at the time, but whatever the circumstances were, I never did know.

Q: But this was early?

A: Yes. This was 1981, 1982, somewhere in there.

Q: I asked you about the blue sheets being kept forever. When things like that happen, if a person gets time

off -- I believe Jerry was given a day off or some time off because he made a traffic stop with Lisa in the car and those incidents go into your personnel file.

As far as you know, do they stay there forever, too?

A: No; I think they are purged after a certain

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[page 47]

A: She told me that sometime in a conversation after the shooting.

Q: But she did tell you?

A: Yes.

Q: And she volunteered it? You didn't ask her?

A: No. As well as I remember, it was in that time frame shortly after the shooting when we had had the debriefing and everybody, you know -- he told us to talk, talk, talk, talk, that was the best way to get it out of our system.

So everybody was talking, you know, 24 hours a day, everybody was talking.

Q: There was a lot to talk about, too, wasn't there?

A: Yes, sir.

MR. SLAYTON: Let's take a break.

(A Recess was taken.)

BY MR. SLAYTON:

Q: Do you recall the years that you were Jerry's supervisor?

A: A long time ago.

Q: Do you know of the stun gun incident?

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[page 48]

A: He and Crowder were working together that night. I heard about it. I saw the pictures.

Q: What pictures?

A: Of the person that had been stunned.

Q: What did the pictures show?

A: It looked like little cigarettes burns on them.

Q: Where were they taken?

A: In the jail. I think they were in the jail.

Q: Why were pictures made? Was there any particular reason?

A: I think there was a complaint filed of brutality.

Q: Was it investigated within the department or did any police agency investigate it?

A: As well as I remember, Chief Sutton showed the pictures to me.

Q: Who was the complaint against?

A: Against Jerry and Crowder.

Q: Does the department keep records of those kinds of complaints that are made against officers?

A: I would assume.

Q: Where would those records be kept?

A: I would assume they would be in the personnel

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[page 56]

I never sat down and the chief never did come out and directly tell me this was his idea or the city manager's idea or both ideas.

Q: Does the chief ever get the lieutenants and the sergeants in for conferences to say, you know, "This is what I want done"?

A: Yes, sir.

Q: And when this new mental health policy came out, did he bring you all together and say, "This is the reason we are doing this"?

A: I can't recall a formal meeting.

Q: We both know that Lexington is a small town and like most small towns everybody knows everybody else's business.

Did the chief or the lieutenant ever get the sergeants in and say to you, "I want this running around and

womanizing stopped. It is a violation of the policy of the department and it makes us all look bad." Did that ever happen?

A: I know the chief didn't like it but I can't say that he ever, you know, came to me and said, "I want this stopped," because I wasn't having any problem with it on my shift, you know. It would have been Sergeant Sutton.

Q: You told us early on that you remembered

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[page 57]

vaguely when Jerry Knick and his first wife were separated and that he slapped her.

Do you know about the time that he went into this establishment in Lexington where she was and threatened to draw his service weapon?

A: No. That is a new one.

Q: Does the department require applicants for employment as a police officer to undergo psychological testing and evaluation now?

A: Yes, sir.

Q: When was that requirement instituted?

A: I honestly don't know. Within the past several years.

Q: Since the lawsuit was filed?

A: No; I think it was before then.

Q: Did Jerry Knick ever undergo any evaluation or testing that you know of?

A: Not that I am personally aware of.

Q: As you watched him engage in these antics did it ever occur to you that that might be an appropriate thing to do?

A: As far as his womanizing? That was basically what Jerry's thing was. He was after everything out here that had a skirt on and there are some guys out here that

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[page 59]

A: Oh, I don't know. You know, based on what Lisa had told me about the telephone call and who I thought the caller was and her synopsis of it was she felt that it was a setup.

That was what she said. That was one of her terms, that it was a setup to get Jerry, for her to go down and catch Jerry, come back and file a complaint against him so that he could be fired and she wasn't going to give anybody the satisfaction of doing that. Those were he exact words.

Q: Lisa thought she was bind used by Molly Crowder to get Jerry fired?

A: What she said was she thought it was a setup by her because she asked me to listen to the tape. She told me about the anonymous call and I listened to it. I can't remember if I listened in entirety but she was more interested in not what they said but in who the caller was, in identifying the caller.

Q: Did you ever tell the chief about the tape?

A: No, sir, not until just some months ago. At that point in time -- there is an old saying, the more you stir shit the worse it stinks and I just didn't see any sense at that time in making any more stink.

MR. SLAYTON: So I guess you feel like that

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[page 60]

is what we have been doing here this afternoon.

CROSS EXAMINATION

BY MR. CARGILL:

Q: Sergeant Straub, I know you aren't quite sure of the time period when you directly supervised Jerry Knick, and correct me if I am wrong, but did you indicate that it was sometime during the period when Jerry was dating Lisa Vincent?

A: Yes; the time they were dating and shortly after they were married.

Q: If you can, can you estimate about how many months that was when you supervised him?

A: Probably a couple of years, I would say, or at least a year.

Q: If Jerry were married in the fall of 1986, would that mean that you supervised him as early as 1984 or 1985? Can you pin it down?

A: I am bad with dates. I would have to go back and look at records.

Q: But you are sure that it was for perhaps up to two years and that that period included the time when

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[page 61]

Jerry was dating Lisa and up to and including the time when he married her?

A: Yes, because I was his best man when they got married.

Q: Would it be fair to say that during the time when you supervised him, when you directly worked with Jerry, it was your opinion that he was a professionally competent policeman?

A: Jerry was a good police officer. He could be a good police officer. I mean, he knew the law. He knew what to do. H could be a goof-off. Like I say, there were times he would go through periods where he just wouldn't do anything. And at other times he would set the world on fire.

Q: Did you ever have any doubts, yourself, about Jerry's fitness to carry a weapon when you supervised him?

A: No.

Q: Was he a reliable policeman?

A: Yes.

Q: If you personally were in a situation where you needed to be backed up or needed to rely upon a fellow policeman, either during this period or at any other time when Jerry was a member of the force, would Jerry be the sort of officer that you would want to be next to you?

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[page 62]

A: Yes. I would rather he be in front of me.

Q: I would like to focus for a few minutes on the events of January, 1990, about the time period when Lisa brought the weapon in in a show box.

First, you are certain that she brought it in in a shoe box marked with Jerry's name on it?

A: Yes.

Q: Would it be fair to say when she brought the weapon in she wanted that event to be confidential?

A: Yes.

Q: In fact, she told you she didn't want it to go beyond that room?

A: That is correct.

Q: And I take it that at least for awhile you had some concerns in your own mind about whether you should report this? You were torn up inside about what you should do with this weapon; is that fair to say?

A: That is fair to say.

Q: And I take it that was because of your loyalty to the department and your loyalty to Lisa, who had come to you in confidence?

A: That is correct, to everybody involved.

Q: Would it be fair to say that Lisa's primary concern was a concern that Jerry would use this weapon to

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[page 63]

threaten or attempt to commit suicide?

A: To harm himself was what she told me.

Q: And it was absolutely clear to you that she had no concern for her own personal safety?

A: I asked her flat-out and she stated that he would never hurt her. Those are her words.

Q: I take it that if you felt like she was in danger herself, you would have handled the situation perhaps a bit

differently?

A: Yes.

Q: You would have contemplated even protecting her, I take it?

A: Yes.

Q: Now, when you arrived at the home a few days after this --0 and this is after Jerry had gotten his weapon back from Sergeant Miller -- when you arrived at the home then, I believe you said that Lisa wasn't crying but she did appear to be scared?

A: Well, she was more hyper and like I say, she had been drinking and she met me at the door with the letter and she was scared but she let me know up front that both she and jerry were very mad at me.

Q: And yet you were the person she called?

A: Yes.

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[page 64]

Q: When she called did she call the 911 number or did she call the general number for the Police Department, if you know?

A: We don't have 911 yet. She called the general number and asked to speak to me.

Q: So in other words, she didn't ask the dispatcher to send just anyone out there to respond to an emergency, she wanted to talk in particular to you?

A: Yes.

Q: I know you said this, but when Mr. Knick eventually did open the door, or however the door got opened, you never saw a weapon in there?

A: No. I wouldn't have left Ramos there by himself if I had seen a weapon.

Q: So you were satisfied when you left that Jerry did no' pose a threat to either Officer Ramos or anyone else in the house?

A: Not at that point, no.

Q: I think we might have a double negative there? You were satisfied that Ramos and other people in the house were safe when you left; is that true?

A: That is correct.

Q: I guess this would be true, would it not, that whenever you respond to a call you have to account for

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[page 65]

the time you spend there; is that correct?

A: Yes.

Q: So the ordinary thing for you to do when you responded to a call like this would be to fill out some sort of report, be it a blue sheet or offense report?

A: Yes.

Q: I know you have said this, but you didn't do that in this situation?

A: I didn't put anything over the radio. And I will explain why.

It is a small town and everybody has got a scanner and I told the dispatcher where I was going and then when I cam back, to the best of my recollection I told her, you know, not to make a blue sheet and then I went to the chief later.

Q: But first you went to Lieutenant Crowder; correct?

A: On Friday night.

Q: That would have been after you got the weapon?

A: Right.

Q: That is when he instructed you to return it to Jerry Knick after either you or Sergeant Miller were satisfied he was fit to carry the weapon and fit to perform his duties?

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[page 66]

A: Yes.

Q: After the suicide threat or this episode at

home where he was crying and writing letters to his wife, then you had a conversation with Chief Beard?

A: Yes.

Q: And that would have been sometime Wednesday morning?

A: The following Wednesday.

Q: Do you recall about what time of day that was?

A: Well, I had worked the 12:00-to-8:00 shift and the chief comes in at usually about a quarter to eight and I was seen shortly after 8:00. Periodically after working that shift, if we have any information to pass on, that is always when we do it, you know.

Q: At that point, of course, no written reports had been filed on any of these matters?

A: No. I told the chief why I didn't make a blue sheet and why there was nothing on the log sheet over the radio.

Q: By that time you had already spoken to Lieutenant Crowder and you had told him about the shoe box incident at least; correct?

A: Yes.

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[page 67]

Q: Had you told lieutenant Crowder anything about the episode at the home?

A: No. See, I hadn't see Lieutenant Crowder.

Q: When you spoke with Chief Beard, I take it that some point in your conversation Chief Beard indicated to you that he was aware of the situation and he had called Jerry Knick in and had ascertained that Jerry Knick was going to get marriage counseling; is that right?

A: Well, what I gathered was that he and Jerry had had a conversation at some point from when I last saw him on Sunday night up until I talked to the chief on Wednesday morning and that Jerry was going to get

counseling. What type I did not know.

Q: Would it be fair to say when you heard that you reached the conclusion that Chief Beard was on top of the situation?

A: Yes, sir.

Q: Would it be fair to say that this indication on Chief Beard's part occurred toward the beginning of your conversation?

A: Sometime during the conversation.

Q: Could it be that that revelation on Chief Beard's part -- the revelation that he knew what was going on, that he had talked to Jerry and that Jerry was getting

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[page 68]

counseling -- could it be that that short-circuited your conversation, that it caused you to be relieved and to not pursue it any further?

A: I talked to the chief and apparently he had spoken with the lieutenant and I had apprised him of Friday evening, of Sunday night and why I didn't document the log and then he told me that Jerry was going to mend his ways and was seeking counseling from a counselor in Staunton.

Q: Did the chief indicate to you any awareness that he knew about the incidents at the home?

A: About the incidents at the home, yes.

Q: Where Jerry was locked up in the bedroom?

A: Well, I talked to him about it, but apparently he knew.

Q: So you got the impression he knew about it?

A: I got the impression he knew about it.

Q: Did you get the impression that the chief knew about the shoe box?

A: Yes.

Q: Would it be fair to say that you got the impression that the chief was aware of all the things that had happened during the weekend and you were just repeating

something that he already knew about?

A: Yes. I mean, I got the impression that he

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[page 72]

A: Yes.

Q: So it is true that they went through the same process, to your knowledge?

A: Yes.

Q: Is it also true that people who competed for sergeant went through that same process?

A: As far as I know.

MR. CARGILL: Thank you, Sergeant Straub.

REDIRECT EXAMINATION

BY MR. SLAYTON:

Q: Sergeant, let me ask you this: Does the name Donna Sensabaugh mean anything to you?

A: That is her married name. I think she used to be a Victim Witness Coordinator. She was a Smith.

Q: Did you know her brother?

A: Bill?

Q: Yes.

A: Yes.

Q: Were you aware of any complaint that Bill Smith made to Chief Sutton regarding threats that had been made to him by Jerry Knick?

A: Bill and Jerry, sometime during the course

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[page 73]

of Jerry dating Donna, apparently had some words, to the best of my recollection, at Donna's parents' house, and I think somebody in the family may have come in and filed a complaint, I don't know. Chief Sutton was the chief then.

Q: So was Jerry dating Donna at that time?

A: Yes; in fact, they lived together for awhile at one point in time.

Q: Was this in 1986?

A: It was before Chief Beard was ever chief. Larry Sutton was chief then.

Q: Is she the same woman who is one of the judge's secretary?

A: The last I heard -- I have not seen Donna since the day before she got married -- she was working for Caldwell Butler here in Roanoke, working out of his office.

Q: But her brother, Bill, and Jerry had some sort of a run-in?

A: Yes. I don't know what it was all about.

Q: Do you know whether or not the matter was pursued in the Circuit Court of Rockbridge County?

A: I have no idea.

Q: If it happen at all, and if it was pursued,

I. Lt. Steven Crowder, Deposition Exhibit #2-
Memorandum of April 1, 1991.....

FILED
DEC 23 1993
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No. 93-824

In The

Supreme Court of the United States

October Term, 1993

CLINTON EDWARD VINCENT, JR., Administrator of the Estate of Myra Lisa Vincent Knick,

Petitioner,

v.

CITY OF LEXINGTON, a Virginia Municipal Corporation; BRUCE BEARD, City of Lexington Police Chief,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the courts below erred in determining that a policeman who murdered his wife in the course of a private domestic dispute did not act under color of state law under 42 U.S.C. § 1983?

Whether the courts below erred in failing to find a duty on the part of a municipality and its Chief of Police to protect a spouse from domestic violence where there was no evidence that either the municipality or Chief knew the spouse was in danger?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 6

I. KNICK DID NOT ACT UNDER COLOR OF STATE LAW WHEN HE MURDERED HIS WIFE IN THEIR HOME IN THE COURSE OF A HEATED ARGUMENT 7

II. DEFENDANTS HAD NO DUTY TO PROTECT MRS. KNICK FROM HER HUSBAND 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990) 10

Blum v. Yaretesky, 457 U.S. 991 (1982) 9

Bonsignore v. City of New York, 683 F.2d 635 (2d Cir. 1982) 8

Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983) 8

City of Los Angeles v. Heller, 475 U.S. 796 (1986) 7

Cornelius v. Town of Highland, 880 F.2d 348 (11th Cir. 1989) 10

Cortes Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988) 10

Czajkowski v. City of Chicago, 810 F. Supp. 1428 (N.D. Ill. 1992) 13

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 11, 12

Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1963) 8

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) 7

Martinez v. California, 444 U.S. 277 (1980).....10, 12

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 7

Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987) 10

Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987).....9, 10

TABLE OF AUTHORITIES – Continued

Page

Polk County v. Dodson, 454 U.S. 312 (1981) 7

Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993) 11

San Francisco Arts and Athletics v. United States Olympic Committee, 483 U.S. 522 (1987) 9

Screws v. United States, 325 U.S. 91 (1945) 5, 8, 11

Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) 13

United States v. Classic, 313 U.S. 299 (1941) 7

United States v. Tarpley, 945 F.2d 806 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1960 (1992) 11

Vosburg v. Solem, 845 F.2d 763 (8th Cir. 1988) 10

West v. Atkins, 487 U.S. 42 (1988) 7

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 1, 7, 9, 10, 11

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia (Pet. App. 4-13) is not reported. The opinion of the Fourth Circuit Court of Appeals (App. 1-5)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1993. The petition for a writ of certiorari was filed on November 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On September 29, 1990, Jerry Knick ("Knick"), then a City of Lexington, Virginia ("City") policeman, fatally shot his wife in their home. The administrator of Mrs. Knick's estate subsequently filed suit against the City and its Chief of Police, Bruce Beard, alleging under 42 U.S.C. § 1983 and Virginia law that they were legally liable for Mrs. Knick's death. The district court granted the respondents' motion for summary judgment as to the § 1983

[1] Petitioner omitted a portion of the court of appeals' opinion. Respondents have attached the entire opinion hereto as an appendix.

claim[2] (Pet. App. 12). The court of appeals affirmed in a *per curiam* unpublished opinion (App. 1-5).

1. Following a heated argument, Jerry Knick shot and killed his wife in their home in Lexington, Virginia. Knick is now serving a ten-year term of imprisonment following his state court conviction for second-degree murder.

The argument between Knick and his wife started in the morning of September 29, 1990, when Mrs. Knick complained about Knick's reluctance to "get affectionate" (J.A. 664).[3] Knick admitted, during his trial for murdering Mrs. Knick, that he was involved in a "[s]exual relations affair" with another woman and that his wife had often complained that he was not spending enough time with her (J.A. 666; 673-74). Knick canceled plans to take his family to the park that day and instead stayed home, off and on arguing with his wife, until he went to work at about 8:00 p.m. (J.A. 670-72).

Shortly after Knick went to work, Mrs. Knick called Sergeant Miller of the Lexington Police Department and asked him to come to her home. Miller, a friend of the family, agreed to come to the Knick home where Mrs. Knick discussed her dissatisfaction with her marriage (J.A. 660). While the two were talking, Knick, who was on duty, came to his home and "was angry to find Miller

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[2] The court dismissed without prejudice petitioner's state claims (Pet. App. 13). Those claims are now pending before the Circuit Court for Rockbridge County, Virginia (Case No. L-166-92).

[3] Citations are to the Joint Appendix ("J.A.") filed in the court below.

there" (App. 3). Knick stayed for a few minutes and left, stating that he would let Miller and Mrs. Knick finish their conversation.

Knick returned about an hour later and told Miller to leave. Knick then aggressively questioned his wife about why Miller was there and became enraged when Mrs. Knick would not answer. According to Knick, his wife "had an expression on her face – a type of smurk [sic] – that pretty much said to me that, you know, she knew she had made me jealous and was glad of it . . . " (J.A. 680). Knick repeatedly demanded to know "what the hell was [Miller] doing [there] . . . " but his wife "still wouldn't answer" (*id.*). Knick "slapped" his wife, pulled his service pistol from his holster and warned her "Don't you ever have [Miller] here again" (J.A. 682). According to Knick, his wife grabbed the weapon, causing it to fire one round into her left temple (J.A. 683-84). Notwithstanding his claim of accident, Knick was convicted of second-degree murder (murder with malice) in state court.

2. Petitioner devotes much of his brief to discussing allegations of fact which, in his view, suggest that Knick's criminal act was somehow connected to his duties and that respondents are responsible for the murder. Focusing on Mrs. Knick's turn-in of her husband's weapon almost nine months before the murder, petitioner asserts a connection between this incident and the murder. In fact, Mrs. Knick specifically stated when she turned in the weapon that she was not concerned for her safety, that she was concerned that Knick would threaten suicide with the weapon as he had in the past when confronted with his infidelity (J.A. 440-42). Following return of the weapon, Knick performed his duties without incident

until the murder. Indeed, Knick's superiors and fellow officers all agreed that he was a professionally competent, dependable policeman (J.A. 153, 210-11, 249, 272-73, 350-51, 360-61, 389, 409-10, 435-36, 475).

Petitioner inaccurately states that his expert witnesses testified that there was a causal connection between the murder and Knick's police training. In fact, each said quite the opposite. Petitioner's "police practices" expert testified that Knick was "a murderer at the time he shot his wife . . . that is all he was" (J.A. 584) and conceded that no amount of training and supervision can prevent a man from going into a "jealous rage" (J.A. 587). Petitioner's police psychologist testified that even if the counseling and training which he suggests should have occurred, had occurred, there is no assurance that Knick would not have killed his wife in a jealous rage (J.A. 623).

Petitioner takes similar liberties with the facts in asserting that Knick had a "history of excessive force" (Pet. 10) and that "quickdraws" of weapons was a "prevalent practice" in the department (Pet. 11). In fact, Knick was disciplined on one occasion in his eight years as a policeman for improper use of a stun gun to subdue an arrestee (J.A. 26-27) and there was no evidence that quickdraws were a "prevalent practice."[4] To the contrary,

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[4] Petitioner makes references to the deposition testimony of Officers Smith, Nedrow and Pedersen to support this allegation. Officer Smith testified that he saw Knick "handle" his weapon more than other officers (J.A. 419). Officer Nedrow said that he saw Knick, after unloading his weapon, pull it several times while breaking in a new holster (J.A. 392). Officer Pedersen testified that he never saw Knick mishandling his weapon and

the written policy of the Lexington City Police Department was that weapons could be drawn only on the firing range or when a life is in jeopardy (J.A. 529). Significantly, Knick acknowledged receipt of the policy and was trained and had trained others to follow it (J.A. 706). Knick, however, drew a distinction between what he was trained to do and "personal life [which] is a whole lot different" (J.A. 704). This fundamental point escapes petitioner.

3. The district court, upon considering the parties' briefs, oral argument and supporting evidence, granted the City's and Chief Beard's motion for summary judgment as to the § 1983 claim. The court found that Knick was not acting under color of state law when he shot and killed his wife, stating: "This was a garden variety domestic dispute which had a tragic ending – the fact that Knick was a police officer was incidental and had nothing to do with state authority" (Pet. App. 12).

4. The court of appeals, in a *per curiam* opinion, affirmed. It had "no difficulty concluding that Officer Knick's murder of his wife was in no way connected to his duties or responsibilities as a policeman" (App. 4). Noting that this Court "has made clear that acts of police officers in the ambit of their personal pursuits are plainly excluded from the term 'color of law' " (citing *Screws v. United States*, 325 U.S. 91, 111 (1945)), the court found that Knick was not acting under color of state law "when he stopped by his house or when he shot his wife" (App. 4).

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that it was permissible to draw an unloaded weapon to practice police skills (J.A. 384).

Moreover, the court held that the district court's grant of summary judgment was independently justified on the ground that "there is simply no evidence that any act or omission on the part of the City of Lexington or Chief Beard was the proximate cause of Lisa Knick's death" (App. 4-5).

ARGUMENT

Petitioner contends (Pet. 23-30) that Knick acted under color of state law when he murdered his wife in their home and faults the court of appeals for failing to recognize his decedent's "liberty interest" in being free from domestic violence at the hands of a police officer. The court of appeals correctly determined that Knick did not act under color of state law and its decision does not conflict with any decision of this Court or any other court of appeals. To the contrary, the court of appeals' decision reflects a routine application of settled principles of law to a particular set of facts. Petitioner's claim of a split in the circuits regarding color of state law analysis rests on the misguided notion that because other courts found state action in materially different factual circumstances, the court below should have found state action under the facts of this case. Further review of this case is not warranted.

I. KNICK DID NOT ACT UNDER COLOR OF STATE LAW WHEN HE MURDERED HIS WIFE IN THEIR HOME IN THE COURSE OF A HEATED ARGUMENT.

Absent some action taken under color of state law, there can be no § 1983 liability. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). In *Monell*, this Court expressly held that imposition of § 1983 liability against a municipality or one of its supervisory employees required proof of an underlying constitutional violation by a municipal employee. *Monell*, 436 U.S. at 690-91. *See also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point" (emphasis in original)); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 (1982) ("under color of state law" requirement of § 1983 and "state action" required for constitutional violation are identical).

Applied to this case, the law is clear that if Knick's murder of his wife was not "under color of state law," then the City and Chief Beard cannot be liable under § 1983. The question is whether Knick acted "in his official capacity or while exercising his responsibilities pursuant to state law" when he killed his wife. *West v. Atkins*, 487 U.S. 42, 49-50 (1988); *see also, Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) *quoting United States v. Classic*, 313 U.S. 299, 326 (1941) ("[A] person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state' ").

Both the district court and the court of appeals correctly answered that question in the negative.

The undisputed facts show that Knick's murder of his wife was in no way connected to his duties or responsibilities as a policeman. Knick was not arresting his wife in his home; he was not serving papers; he was not investigating a crime; he was not performing any police duty. He had an argument with his wife which escalated to the point of violence and eventually murder.

The only fact suggested by petitioner to distinguish this tragedy from so many other fatal domestic disputes is that one of the participants was a policeman. It is settled, however, that the fact of an individual's employment by a police department does not cloak all the acts of that individual with the "color of state law." This Court long ago made this point, stating "acts of officers in the ambit of their personal pursuits are plainly excluded from the term 'color of law.' " *Screws v. United States*, 325 U.S. 91, 111 (1945). Similarly, the Seventh Circuit has held that "[a]cts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way 'related to the performance of police duties.' " *Briscoe v. LaHue*, 663 F.2d 713, 721 n.4 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983) (quoting *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1963)); *see also Bonsignore v. City of New York*, 683 F.2d 635 (2d Cir. 1982) (officer who shot wife and committed suicide in private dispute did not act under color of state law). The court below correctly applied this settled principle of law to the undisputed facts before it.

Petitioner is wrong in claiming that this case would have been decided differently had it been decided under the standard for determining the existence of governmental action set forth in *San Francisco Arts and Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987). In the context of determining whether the actions of the United States Olympic Committee, a corporation chartered under federal law and funded in part with federal funds, were governmental actions, this Court held that only where the actions are the result of "significant encouragement, either overt or covert" by the government will those actions be deemed to be those of government. *San Francisco Arts*, 483 U.S. at 546. The Court emphasized that " 'mere approval of or acquiescence in' " the actions are not sufficient to create governmental action. *Id.* at 547, quoting *Blum v. Yaretesky*, 457 U.S. 991, 1004-1005 (1982). In this case, there was not a shred of evidence that the respondents encouraged Knick to harm his wife or even approved of Knick's criminal act in any way. This case would not have been decided differently under the *San Francisco Arts* analysis – a case petitioner did not cite below.

The other decisions cited by petitioner do not support his claim that this case would have been decided differently in other circuits. Each case cited involved materially different facts. In *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987), for example, the court considered whether jail officials who entrusted a marked police car to a jail trustee, who murdered a motorist after using the car to pull her off the road, could be liable under 42 U.S.C. § 1983 for failing to control the trustee. The court answered the question in the affirmative noting that the

officials knew the trustee was dangerous and knew that he had been illegally stopping motorists and did nothing to prevent the activity. The court concluded that the jailers "facilitate[d] the crime by providing the [trustee] with the necessary means and the specific opportunity to commit his crime." *Nishiyama*, 814 F.2d at 281. *See also Cornelius v. Town of Highland*, 880 F.2d 348 (11th Cir. 1989) (municipality may owe special duty to protect persons in vicinity of inmates). Here, Knick was not in custody, and there was no evidence that the respondents "facilitated" the murder. The murder was, as the district court succinctly put it, the tragic result of a "garden variety domestic dispute" (Pet. App. 12). Thus, this case is easily distinguishable from *Nishiyama*.

This case is also distinguishable from other cases cited by petitioner involving persons in custody to whom the state may owe a special duty of protection. *See Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990) (inmate murdered by fellow inmates against whom the decedent had given a statement to authorities); *Vosburg v. Solem*, 845 F.2d 763 (8th Cir. 1988) (inmate raped by fellow inmates); *Cortes Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988) (death of prisoner in overcrowded cell); *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987) (inmate injured in fight). Mrs. Knick, of course, was not in custody and, therefore, she was not owed a special duty of protection. *See Martinez v. California*, 444 U.S. 277, 285 (1980) (state not liable under § 1983 for murder of individual by paroled murderer even where state knew or should have known that parolee created a "clear and present danger" that such an incident would occur).

Contrary to petitioner's contention, neither *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993) nor *United States v. Tarpley*, 945 F.2d 806 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1960 (1992) demonstrate that this case would have been decided differently in the Seventh and Fifth Circuits, respectively. *Reed* involved a § 1983 claim against policemen who left an obviously intoxicated passenger in the car of an individual arrested for drunk driving. The passenger drove the car and was involved in a head-on collision. Citing *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the court held that the policemen could be liable under § 1983 for creating the very danger which resulted in the accident. The existence of state action was not an issue, as the officers clearly were performing a law enforcement function when they arrested the drunk driver and left the keys with the drunk passenger.

Tarpley involved a policeman who, with the help of fellow officers, physically assaulted his wife's former boyfriend. Tarpley identified himself as a policeman, stated that he had the authority to kill the boyfriend and, after assaulting the boyfriend, followed him out of town in a patrol car with other policemen. *Tarpley*, 945 F.2d at 808. The court, not surprisingly, found state action because Tarpley used his special status to facilitate his assault and enlisted other officials to assist in the misconduct. *Tarpley*, 945 F.2d at 809. Significantly, the court applied the "color of state law" test established in *Screws v. United States*, 325 U.S. 91 (1944) – the test which the court of appeals applied in this case.

In sum, the courts below did nothing novel when they found no action under color of state law in this case.

They applied this Court's analysis to a particular set of facts and found no state action. That other courts, on plainly distinguishable facts, found state action in other cases does not detract from this conclusion.

II. DEFENDANTS HAD NO DUTY TO PROTECT MRS. KNICK FROM HER HUSBAND.

In *Martinez v. California*, 444 U.S. 277 (1980) and later in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) this Court made clear that state actors have no general constitutional duty to protect individuals from danger. Such a duty may arise, the *DeShaney* Court noted, only where the state played some part in creation of the particular danger or made the victim more vulnerable. *DeShaney*, 489 U.S. at 281. In this case, the court of appeals found that there was "simply no evidence that any act or omission on the part of the City of Lexington or Chief Beard was the proximate cause of Lisa Knick's death" (App. 4). Petitioner apparently takes issue with this fact-bound conclusion[5] when he argues that the court failed to recognize his decedent's "liberty interest" (Pet. 29) in being free from domestic violence. The claim does not warrant review.

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[5] Here, again, petitioner places great emphasis on the incident occurring almost nine months before the murder when Mrs. Knick, after catching her husband with another woman, turned his weapon in to the Department so he would not use it to threaten suicide as he had when previously confronted with his infidelity (J.A. 440-41). Mrs. Knick expressed no concern for her safety (J.A. 442) and, following evaluation and return of the weapon, Knick performed his duties without incident until the murder.

First, even if this "liberty interest" exists, the absence of state action is fatal to petitioner's claim. Thus, at best, this case presents a purely academic question.

Second, there is no general "liberty interest" in being free from domestic violence. The only case petitioner cites for the proposition is *Czajkowski v. City of Chicago*, 810 F. Supp. 1428 (N.D. Ill. 1992). In *Czajkowski*, a policeman, Garza, and his partner pulled alongside Garza's wife in a marked police car and signaled her to pull over because she had allegedly committed a traffic offense. *Czajkowski*, 810 F. Supp. at 1437. The wife complied. Garza then assaulted his wife and threatened to arrest her. Garza's partner failed to intervene. The court held that Garza was acting under color of state law, noting that he used his power as a policeman to facilitate his misconduct. *Id.* at 1437. The court also held that the Department could be liable for the assault because it failed to discipline officers for use of excessive force and showed deliberate indifference to domestic abuse as evidenced by the partner's failure to intervene. *Id.* at 1438-1440. The court did not find some general constitutional right to be free from domestic abuse. It simply held that on the particular facts before it the defendants could be liable under § 1983.

Czajkowski does not conflict with the Fourth Circuit's decision in this case. Indeed, the Fourth Circuit has not hesitated to find liability in circumstances analogous to those present in *Czajkowski*. *See e.g. Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) (police department liable for policeman's assault on arrestee where evidence showed that department was aware of and encouraged such assaults). Those circumstances, however, are not present in this case. Knick did

not act under color of state law, and there was no causal connection between any acts on the part of respondents and the murder.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CLINTON EDWARD VINCENT, JR., Administrator, Estate of Myra Lisa Vincent Knick, *Plaintiff-Appellant.* v. CITY OF LEXINGTON, a Virginia Municipal Corporation; HAUCH BEARD, City of Lexington Police Chief, *Defendants-Appellees.*	No. 92-2129

Appeal from the United States District Court
for the Western District of Virginia, at Lynchburg.
Jackson L. Kiser, District Judge.
(CA-91-48-L)

Argued: June 10, 1993

Decided: September 1, 1993

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and HAMILTON and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Thomas J. Foltz, Alexandria, Virginia; Franklin M. Slayton, South Boston, Virginia, for Appellant, William Fain Rutherford, Jr., WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellees. **ON BRIEF:**

Randy V. Cargill, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Clinton Vincent, the Administrator of the Estate of Lisa Vincent Knick, filed a civil rights action pursuant to 42 U.S.C. § 1983 (1988) against the City of Lexington and the Chief of the Lexington Police Department (referred to herein collectively as "the City"). The complaint alleged that the City was liable for Lisa Knick's wrongful death because Jerry Knick, Lisa Knick's husband and an officer of the Lexington Police Department, was acting under color of state law when he shot and killed his wife. The district court granted summary judgment for the City, and we affirm.

I

This is a tragic case. Jerry Knick was hired as a policeman for the City of Lexington, Virginia in 1982. Four years later he married Lisa Vincent. For our purposes, it is enough to note that the marriage was not a happy one.

On September 29, 1990, a distraught Lisa Knick called Sergeant Miller of the Lexington Police Department and asked him to come to her home. Miller, who was a friend of both Jerry and Lisa Knick, was not on duty at the time

and agreed to come to the Knick home. Lisa Knick then told Miller about her dissatisfaction with her marriage. Later Officer Knick, who was on duty at the time, came to his home and was angry to find Miller there. Officer Knick left for about an hour, saying that he would allow his wife and Miller to finish their conversation, Miller was still there when Officer Knick returned. Officer Knick asked Miller to leave, and Miller complied. The Knicks then engaged in a heated argument. At some point, Knick pulled his service revolver from his holster. According to Officer Knick his wife then grabbed the weapon, causing it to fire one round into her left temple. A jury, sitting in the Circuit Court of Rockbridge County, convicted Knick of second degree murder based on a finding that Officer Knick killed his wife with malice. Jerry Knick is now serving a ten-year term of imprisonment for the murder of his wife.

On September 23, 1991, the Administrator of Lisa Knick's estate filed a suit against the City of Lexington and Chief of Police Beard alleging that under 42 U.S.C. § 1983 they were legally liable for Lisa Nick's death. The district court determined that Officer Knick was not acting under color of state law when he shot and killed his wife. Because action under color of state law is a necessary finding for the imposition of liability under § 1983, and finding no material facts in dispute, the district court granted Appellees' summary judgment motion.

II

To state a claim under § 1983, the appellant must allege the violation of a constitutionally protected right or

other right secured by federal law and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Applied to this case, if Knick's murder of his wife was not an action taken "under color of state law," there can be no § 1983 liability. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). The question is whether Officer Knick acted "in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. at 49-50.

We have no difficulty concluding that Officer Knick's murder of his wife was in no way connected to his duties or responsibilities as a policeman. The only fact distinguishing this murder from other fatal domestic disputes is that Jerry Knick was a policeman. But the Supreme Court has made clear that acts of police officers in the ambit of their personal pursuits are plainly excluded from the term "color of law." *Screws v. United States*, 325 U.S. 91, 111 (1945). Although Officer Knick was on duty at the time these unfortunate events occurred, he was not acting within the scope of his official duties when he stopped by his house or when he shot his wife.

Citing *Gibson v. Chicago*, 910 F.2d 1510 (7th Cir. 1990), Appellant contends that the City remains subject to § 1983 liability even absent a finding that Knick acted under color of state law when he shot his wife. Appellant maintains that either the City's failure to adequately train Officer Knick, or its decision to retain Officer Knick on the police force in the face of alleged evidence that he was emotionally unstable, provides a sufficient basis for imposing § 1983 liability. But even if we agreed with Appellant's reading of *Gibson*, there is simply no evidence

that any act or omission on the part of the City of Lexington or Chief Beard was the proximate cause of Lisa Knick's death. Further, *Gibson* does not stand for the proposition that § 1983 liability may be imposed absent a finding Officer Knick acted under color of state law. See *Gibson*, 910 F.2d at 1514 ("Action under color of state law is a jurisdictional prerequisite to a § 1983 claim.").

As Judge Jackson Kiser stated: "This was a garden variety domestic dispute which had a tragic ending – the fact that Knick was a police officer was incidental and had nothing to do with state authority." (J.A. at 769). We agree, and affirm the district court's disposition of the § 1983 claim.*

AFFIRMED

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* Because the § 1983 claim provided the basis for federal jurisdiction in this action, the district court was correct to dismiss without prejudice Appellant's state law claims.